APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-156

THE VENDO COMPANY, a Missouri corporation,
Petitioner,

vs.

LEKTRO-VEND CORP., a Delaware corporation,
HARRY B. STONER and STONER INVESTMENTS, INC.,
a Delaware corporation,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 4, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 21, 1965
Filed complaint and one copy.

December 28, 1965
Filed defendant's motions to dismiss or, in the alternative, for a more definite statement.

December 28, 1965
Filed suggestions in support of defendant's motion to dismiss, or in the alternative for a more definite statement.

January 31, 1966
Filed plaintiffs' memorandum in response to defendant's motion to dismiss the complaint.

February 11, 1966
Filed reply to plaintiffs' suggestions in opposition to motion to dismiss.

April 7, 1966
Defendant's motion to dismiss the complaint herein or, in the alternative, for a more definite statement considered and denied. Defendant is directed to answer complaint on or before twenty (20) days from date of this order.

November 23, 1970
Filed motion of plaintiffs for summary judgment.

November 23, 1970
Filed brief of plaintiffs in support of their motion for a partial summary judgment on the issue of liability.

January 15, 1971
Filed brief in answer to plaintiffs' motion for partial summary judgment; exhibits.

February 5, 1971
Filed reply brief of plaintiffs in support of their motion for summary judgment.

February [illegible], 1971
Filed defendant's motion for summary judgment, with affidavit of Lambert M. Ochsenschlager and exhibits attached.

February 12, 1971
Filed brief in support of defendant's motion for summary judgment.

March 29, 1971
Filed brief of plaintiffs in opposition to motion of defendant for summary judgment on the issue of liability.

April 12, 1971
Filed reply brief of defendant in support of defendant's motion for summary judgment.

June 1, 1971
Pursuant to memorandum opinion and order entered this day, the motions of plaintiffs and defendant for summary judgment are hereby denied. The parties are ordered to brief the issue of whether plaintiff is now precluded from asserting his federal anti-trust claim in the federal court by the doctrine of res judicata on the briefing schedule set out in the memorandum opinion.

June 22, 1971
Filed defendant's memorandum.

July 1, 1971
Filed plaintiff's reply memorandum in opposition to the contention that they are precluded from asserting their federal anti-trust claim by the doctrine of res judicata.

July 27, 1971
Filed motion for leave to file instanter its reply brief by defendant; stipulation; and reply brief of defendant regarding the preclusion of the plaintiffs from asserting their federal anti-trust claim by the doctrine of res judicata.

October 21, 1971
Filed Judge's Memorandum opinion.

March 10, 1972
Enter order defendant's motion to vacate order continuing status call to June 16, 1972 for a pretrial hearing, and for oral arguments and decision on the motions pending before the court is hereby denied.

June 28, 1973
It is ordered that this cause is hereby set for a pretrial conference on August 10, 1973 at 10:30 a.m. in the chambers of Judge McLaren, Room 1978.

August 10, 1973
Pretrial conference held. Cause is set for a further pretrial conference on October 19, 1973 at 9:30 a.m. at which time the parties are to submit a memorandum scheduling remaining discovery and setting a cut-off date thereon.

October 19, 1973
Pretrial conference held. Cause is continued to December 19, 1973 at 10:00 a.m. for a further report on status.

October 1, 1974
Enter order dated 10-1-74: Cause is continued to November 7, 1974 for a pretrial conference at 1:30 p.m. in the chambers of Judge McLaren, Room 1978.

November 1, 1974
Enter order dated 10-31-74: On the Court's own motion, it is ordered that this cause is hereby reset from November 7, 1974 to December 5, 1974 at 9:30 a.m. in the chambers of Judge McLaren, Room 1978, for a pretrial conference.

December 9, 1974
Enter order dated December 5, 1974: Pretrial conference held. The plaintiff is granted to January 21, 1975 (45 days) in which to amend complaint. The defendants are granted to February 20, 1975, (30 days) in which to file their answer or otherwise plead. Parties

are to serve a memorandum as to remaining discovery upon each other. Cause is set for a further pretrial conference on March 3, 1974 at 9:30 a.m.

January 2, 1975
Filed amended and supplemental complaint and one copy.

January 20, 1975
Filed memorandum of further discovery to be conducted by plaintiffs.

January 29, 1975
Filed plaintiffs' H. B. Stoner and Stoner Investments, Inc. motion for preliminary injunction.

January 29, 1975
Filed affidavit of Harry B. Stoner.

January 29, 1975
Filed additional affidavit of James E. S. Baker.

January 29, 1975
Filed counter-affidavit of L. M. Ochsenschlager to additional affidavit of James E. S. Baker.

February 6, 1975
Filed defendant Vendo Co.'s answer to Amended and Supplemental Complaint.

May 29, 1975
Filed defendant-appellant's notice of appeal.

May 30, 1975
Enter order dated May 29, 1975. The court does this day hereby enter its memorandum opinion order. The plaintiffs' motion for a preliminary injunction is granted.

June 17, 1975
Filed defendant's additional memorandum regarding proposed injunction order and suggestion of proposed consent decree.

June 30, 1975
Enter order dated June 27, 1975. The motion for preliminary injunction is hereby granted.

July 16, 1975
Filed second notice of appeal on behalf of defendant-appellant.

May 28, 1976
Opinion of United States Court of Appeals for the Seventh Circuit.

May 28, 1976
Order and judgment of United States Court of Appeals for the Seventh Circuit.

June 11, 1976
Filed defendant-appellant's Petition for Rehearing with Suggestion for Rehearing En Banc.

July 16, 1976
Order of United States Court of Appeals for the Seventh Circuit, on rehearing.

August 4, 1976
Filed Petitioner The Vendo Company's Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

October 4, 1976
Order of United States Supreme Court granting Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Complaint in Vendo Co. v. Stoner (state court suit)

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

No. 65-2134

THE VENDO COMPANY, a foreign corporation,
Plaintiff,

vs.

HARRY B. STONER and STONER INVESTMENTS, INC., a foreign corporation,
Defendants.

COMPLAINT
(Filed August 10, 1965)

COUNT I

Now comes the plaintiff, The Vendo Company, a foreign corporation, by Reid, Ochsenschlager, Murphy and Hupp, its attorneys, and for Count I of its Complaint against the defendant, Harry B. Stoner, alleges as follows:

1. That the defendant, Harry B. Stoner, is a resident of the City of Aurora, Kane County, Illinois.

2. That for many years prior to April 3, 1959, the defendant, Harry B. Stoner, was the chief executive officer and principal stockholder of Stoner Manufacturing Company, an Illinois corporation; that the aforesaid corporation was engaged in the manufacture and sale of vending machines in the City of Aurora, Kane County, Illinois; that by reason of mergers and changes of name the Stoner Manufacturing Company, of which the defendant, Harry B. Stoner, was the chief executive officer, has been succeeded by and is now known as Stoner Investments, Inc., a foreign corporation; that hereafter said company shall be referred to herein as Stoner Investments, Inc.

3. That on April 3, 1959, the plaintiff, The Vendo Company, and the defendant, Stoner Investments, Inc., entered into a contract by which the plaintiff purchased the assets of Stoner Investments, Inc., including the good will incident thereto.

4. That said contract provided in part, (the word "Company" meaning the defendant, Stoner Investments, Inc.):

> "From and after the closing, the Company will not own, directly or indirectly, manage, operate, join, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business engaged in the manufacture and sale of vending machines under any name similar to the Company's present name, and, for a period of ten (10) years after the closing, the Company will not in any manner, directly or indirectly, enter into or engage in the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by the Company. The Company also agrees that during its corporate existence it will, without incurring any financial obligation, cooperate with Vendo to prevent the use by others of the names 'Stoner' and 'Stoner Mfg. Corp.' in connection with any business similar to that now carried on by the Company and also agrees not to disclose to others, or make use of, directly or indirectly, any formulae or process now owned or used by the Company."

5. That incident to the aforesaid transaction plaintiff entered into a contract with Harry B. Stoner on June 1, 1959, whereby Stoner was employed by the plaintiff for a period of five (5) years from the date of the contract; that the aforesaid contract provided in part as follows:

> "During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or

by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or salesman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter."

6. That the plaintiff has fully performed on its part all of its obligations and duties pursuant to the aforesaid contract.

7. That the defendant, Harry B. Stoner, both during the term of his employment by the plaintiff and thereafter, but within the five (5) year period specified in the contract, violated and breached his duties and obligations thereunder in that he has both directly and indirectly entered into the vending machine manufacturing business individually, as a partner, officer, stockholder, or joint venturer, in the Lektro-Vend Corp., a foreign corporation; that plaintiff is unaware of the exact nature and extent of defendant Stoner's interest therein.

8. That the aforesaid corporation engages in the manufacture of vending machines in competition with the plaintiff, and in territories in which the Company or its subsidiaries or affiliates have been, or are, conducting business at all times material herein.

9. That unless restrained by an Injunction of this Court, the defendant, Harry B. Stoner, will continue at his engagement in the aforesaid enterprises and cause continuing irreparable damages to the plaintiff, The Vendo Company, and will cause the plaintiff irreparable damages in the future.

10. That the plaintiff, The Vendo Company, has been damaged by the defendant, Harry B. Stoner's breach in the amount of Five Hundred Thousand Dollars ($500,000.00), together with the costs of this suit.

Wherefore, the plaintiff, The Vendo Company, prays as follows:

1. That it have judgment against the defendant, Harry B. Stoner, in the amount of Five Hundred Thousand Dollars ($500,000.00), together with the costs of this suit.

2. That the defendant, Harry B. Stoner, be restrained by an Order of this Court during the pendency of the litigation, and thereafter by an Order of Injunction, restraining him from engaging in the vending machine manufacturing business, or any branch thereof, and particularly from participating in the operations of Lektro-Vend Corporation, a foreign corporation, as partner, stockholder, joint venturer, employee, agent, salesman, officer, or director.

COUNT II

Now comes the plaintiff, The Vendo Company, a foreign corporation, by Reid, Ochsenschlager, Murphy and Hupp, its attorneys, and for its Complaint against the defendant, Stoner Investments, Inc., a foreign corporation, alleges as follows:

1-6. For paragraphs 1 through 6, inclusive, of Count II, plaintiff repeats and realleges, and incorporates herein, paragraphs 1 through 6, inclusive, of Count I of its Complaint.

7. That the defendant, Harry B. Stoner, is still the chief executive officer and principal stockholder of Stoner Investments, Inc.

8. That the defendant, Stoner Investments, Inc., in violation of its obligations and duties pursuant to the aforesaid contract, has indirectly engaged and participated in the ownership, management, operation and control of the business of the manufacture and sale of vending machines by consenting to and actively permitting its facilities, officers, agents and employees to be used by said Lektro-Vend Corporation in the sale and manufacturing of vending machines in competition with the plaintiff, The Vendo Company.

9. That the defendant, Stoner Investments, Inc., has consented to and actively permitted the engagement of its chief executive officer and principal stockholder, Harry B. Stoner, in the vending machine manufacture and sale contrary to its duties and obligations pursuant to the aforesaid contract.

10. That the defendant, Stoner Investments, Inc., has allowed and encouraged the use of the name "Stoner" in connection with a business similar to that carried on by the plaintiff, to-wit, the manufacturing and sale of vending machines, in violation of its duties and obligations pursuant to the aforesaid contract.

11. That by virtue of the aforesaid breaches of contract by the defendant, Stoner Investments, Inc., the plaintiff has been deprived of its contractual benefits and of the good will attendant upon the aforesaid sale of assets.

All to the damage of the plaintiff, The Vendo Company, in the amount of Five Hundred Thousand Dollars ($500,000.00), together with the costs of this suit.

Wherefore, the plaintiff, The Vendo Company, a foreign corporation, demands judgment against the defendant, Stoner Investments, Inc., a foreign corporation, in the amount of Five Hundred Thousand Dollars ($500,000.00), together with the costs of this suit.

/s/ Reid, Ochsenschlager, Murphy & Hupp
Attorneys for Plaintiff

Docket Entries in The Vendo Co. v. Stoner, *et al.*, No. 65 C 1364, United States District Court for the Northern District of Illinois, Eastern Division

(Attempted Removal of State Case to Federal Court)

August 16, 1965
Filed Petition for removal, Copy of complaint and summons from Circuit Court for the Sixteenth Judicial Circuit Kane County, Illinois No. 65 C 2134
Filed Affidavit re General Rule 39
Filed Designation
Filed Notice by Defendant
Filed Removal Bond

August 20, 1965
Filed Objections to Petition for removal and petition for remand

September 2, 1965
Filed Reply of defendants to Plaintiff's Objections to Removal

September 2, 1965
Filed Answer, Separate Defenses and Counterclaims of defendants.

September 3, 1965
Filed Notice of Deposition of The Vendo Co. Plaintiff

September 9, 1965
Filed Reply to defendants reply to plaintiffs objections to removal (To Judge Will)

September 9, 1965
Filed Motion to strike notice of deposition by pltff.

September 22, 1965
Filed Stipulation

September 22, 1965
By stipulation order time for filing any responsive pleadings or other documents, by any party hereto, extended until 20 days following the entry of an order on plaintiffs petition for remand—DRAFT Will, J. Mld.Ntcs. September 24, 1965

September 23, 1965
Plaintiffs' petition for remand granted. Order cause remanded to the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois—Will. J. Mld. Ntcs. September 24, 1965

September 27, 1965
Letter mailed to Clerk of Circuit Court, Geneva, Ill.

Reply to Plaintiff's Objections to Removal in Vendo Co. v. Stoner, *et al.* (state court suit)
(Filed September 2, 1965)

[CAPTION OMITTED IN PRINTING]

In reply to the Objections to Petition for Removal and Petition for Remand filed by Plaintiff herein, there is no question that the requisite jurisdictional amount exists in this controversy and that there is diversity of citizenship between Plaintiff and Defendants. As Plaintiff is well aware, the filing of the subject lawsuit by Plaintiff again raises the question as to the propriety of Plaintiff's commercial conduct under the antitrust laws of the United States and the validity thereunder of the non-competition covenants sought to be enforced in such suit.

Since the antitrust laws of the United States will be involved, both in the way of defense to Plaintiff's action and as a separate cause of action on behalf of Defendants against Plaintiff, the suit was removed to this forum in an effort to avoid a needless duplication of lawsuits between the parties.

The objection raised by Plaintiff as to the application of Section 1441(b) is not jurisdictional. In an action removed from the state court, where diversity exists and the requisite jurisdictional amount is involved, the objection based on the second sentence of Section 1441(b) is an objection that may be waived without adversely affecting this Court's jurisdiction.

If Plaintiff, upon reflection, would prefer one lawsuit in this Court, rather than separate actions in both State and Federal Courts, it may waive its objections, and this action may proceed here. If Plaintiff is not willing to waive its objection based on Section 1441(b), and the Court orders the removal of this case, then Defendants will be

forced, by separate action, to enforce their rights under the antitrust laws of the United States.

Respectfully submitted,

JAMES E. S. BAKER

James E. S. Baker

ROBERT A. DOWNING

Robert A. Downing

Of Counsel:

Sidley, Austin, Burgess & Smith
11 South LaSalle Street
Chicago, Illinois 60603
STate 2-5400

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, HARRY B. STONER, and STONER INVESTMENTS, INC., a Delaware corporation, **Plaintiffs,** **v.** **THE VENDO COMPANY, a Missouri corporation,** **Defendant.**	**No. 65 C 1755**

COMPLAINT

(Filed October 21, 1965)

Plaintiffs, by their attorneys, JAMES E. S. BAKER and ROBERT A. DOWNING, complaining of defendant, THE VENDO COMPANY, allege as follows:

1. These proceedings are instituted and the jurisdiction of this Court is based upon Sections 4 and 16 of the Clayton Act (15 U.S.C., 15 and 26) and Section 1337 of the Judicial Code (28 U.S.C. 1337) against defendant, THE VENDO COMPANY (hereinafter called "VENDO"), for violations as hereinafter alleged of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2).

2. VENDO transacts business within the Northern District of Illinois.

3. Plaintiff, HARRY B. STONER (hereinafter called "STONER"), is an individual, resident of Aurora, Illinois. He has been in the business of designing and manufacturing vending machines in Aurora, Illinois for more than 25 years. Prior to 1959, he was the President and one of the principal owners of STONER MFG. CORP. (hereinafter called

"STONER MFG."), which company was an Illinois corporation engaged in the manufacture and sale of vending machines. In 1959, said STONER MFG. sold substantially all of its operating assets to VENDO pursuant to a contract of sale, a true and correct copy of which is attached to this complaint as Exhibit A.

4. Plaintiff, STONER INVESTMENTS, INC., a Delaware corporation, (hereinafter called "STONER INVESTMENTS"), is a successor to the Illinois corporation, which prior to May, 1959, was named STONER MFG. CORP., which Illinois corporation was a party to the contract of sale (Exhibit A), which Illinois corporation, upon the sale of its principal assets to VENDO, in 1959, changed its name to STONER INVESTMENTS, INC. In July, 1964, STONER INVESTMENTS purchased approximately 25% of the common stock of LEKTRO-VEND CORP., a Delaware corporation (hereinafter called "LEKTRO-VEND").

5. Plaintiff, LEKTRO-VEND, is and since September 1, 1963, has been a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Aurora, Illinois. This business was originally started as a sole proprietorship under the name and style R. W. PHILLIPS COMPANY in November, 1960 and later did business under the name and style LEKTRO-VEND MANUFACTURING COMPANY. Prior to incorporation the business was primarily that of research and design in the vending machine business. In and prior to November, 1962, as a result of the extensive research, a new, novel and improved vending machine was designed and developed. LEKTRO-VEND has been engaged in the continued improvement of its new machine and in the design, development, manufacture and sale of automatic merchandising equipment (vending machines), particularly vending machines for candy, cookies and crackers, packaged gum, pastry, potato chips, pretzels, and other multi-purpose food vending equipment. It is in competition with VENDO.

6. Defendant, THE VENDO COMPANY, is a Missouri corporation with its principal place of business in Kansas City, Missouri. It proclaims itself to be and it is the world's largest manufacturer of automatic merchandising equipment (vending machines). VENDO has manufacturing plants in Kansas City, Missouri; Aurora, Illinois; Pinedale, California; and Westbury, New York. VENDO has subsidiaries or affiliates in Mexico, Germany, Japan, Australia, Italy, France, Canada, and Belgium. VENDO sells such machines so produced in all 50 states and in more than 60 countries and territories. VENDO maintains offices for such sales in Los Angeles, California; Dallas, Texas; Chicago, Illinois; Cleveland, Ohio; Atlanta, Georgia; Hasbrouck Heights, New Jersey; Toronto, Ontario; Duesseldorf, West Germany; Paris, France; Milan, Italy; Sydney, Australia; Brussels, Belgium; Johannesburg, South Africa. VENDO has regional managers or representatives in California, Colorado, Florida, Georgia, Illinois, Indiana, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin and San Juan, Puerto Rico.

7. At the present time, VENDO has control of over 40% of the entire business of the manufacture of vending machines in the United States. VENDO has control of between 50% and 100% of the manufacture of vending machines for the vending of candy, pastry, milk and ice cream, and of multi-purpose (refrigerated and non-refrigerated) food vending machines, which is the field in which LEKTRO-VEND has attempted to compete with VENDO. In 1964, VENDO's sales of vending machines for hot and cold food, coffee, milk, ice cream, candy, pastries, and cigarettes exceeded $28,000,000, an increase of approximately 15% over the preceding year and more than double the comparable sales for the year 1959. In the year 1964, the sales of the above-named products accounted for in excess of 40% of the total sales of VENDO. In 1964, sales of vending machines for

confections and foods of all manufacturing companies totaled approximately $31,915,000.

8. VENDO has monopolized, and attempted to monopolize, the trade and commerce in the State of Illinois, among the several states and with foreign countries, in the business of manufacturing and selling vending machines, and has acquired as the result of its unlawful activities, control over so substantial a portion of such trade and commerce as to obtain the power to remove or to exclude competitors from the field. VENDO now possesses such power and has possessed such power for a number of years and has demonstrated its intent to remove or exclude competitors from the vending machine manufacturing business. For purposes of this complaint, the relevant geographic markets or parts of commerce and trade are:

(1) the entire United States;

(2) each of the six regional sales markets of VENDO, which are its Eastern, Southern, Central, Midwestern, Southwestern and Western Divisions;

(3) commerce with Canada;

(4) commerce with other countries than Canada;

(5) the State of Illinois; where the STONER MFG. division is located.

For the purposes of this complaint, the relevant products or parts of trade or commerce are:

(1) vending machines for food, beverages, confections and cigarettes;

(2) vending machines for food, beverages and confections;

(3) vending machines for food and confections;

(4) vending machines for candy bars, excluding bulk vending equipment;

(5) vending machines for packaged chewing gum;

(6) vending machines for pastries, such as vending machines for sweet rolls, cupcakes and doughnuts;

(7) vending machines for hot canned foods and soups;

(8) vending machines for snacks, excluding candy bar vendors, such as machines for sale of cookies, crackers, biscuits, popcorn, ice cream, potato chips, pretzels, corn chips, or cheese sticks;

(9) Multi-purpose, refrigerated and non-refrigerated vending machines for food, such as machines for sale of sandwiches and salads;

(10) vending machines for confections, such as machines for candy, gum, mints, potato chips, corn chips, cheese sticks, pastry, sweet rolls, pies, cupcakes, doughnuts;

(11) vending machines for coffee;

(12) vending machines for soft drinks;

(13) other vending machines for beverages, such as machines for sale of milk, hot chocolate and/or hot soup (except canned soup) not sold in a combination machine with coffee.

9. VENDO has engaged in numerous overt acts in an effort to establish, maintain, use and increase its monopoly power over the trade and commerce of vending machines in the State of Illinois, the several states and foreign countries. The intent of these acts is and has been to eliminate the competition of LEKTRO-VEND and other companies and to deter potential competitors from entering the field. These overt acts referred to above are alleged in succeeding paragraphs of this complaint.

10. On or about September 18, 1956, pursuant to its plan of monopolization, VENDO acquired all the outstanding

capital stock, assets and business of VENDORLATOR MANUFACTURING COMPANY, a California corporation, including its patents and good will, in exchange for 267,464 shares of common stock of VENDO. Prior to the said acquisition, VENDO and the VENDORLATOR MANUFACTURING COMPANY were competitors in the production and sale of coin operated vending machines built to dispense bottled soft drinks in the United States. VENDO is, and prior to the said acquisition was, the largest manufacturer of coin operated vending machines built to dispense bottled soft drinks in the United States. The combined sales of VENDO and the VENDORLATOR MANUFACTURING COMPANY from 1955 to the present have accounted for and now account for in excess of 40% of the market involved. The VENDORLATOR MANUFACTURING COMPANY is now a division of VENDO. In 1964 the sales of beverage vending machines by VENDO exceeded $28,000,000. The above alleged acts of VENDO demonstrate an intent to obtain and increase its monopoly power and to monopolize the vending machine manufacturing business.

11. Since the fall of 1958, and continuing to the present date, pursuant to its plan of monopolization, VENDO has engaged in and actively participated in a conspiracy to steal valuable trade secrets from a company now named NATIONAL REJECTORS, INC., a subsidiary of the UNIVERSAL MATCH CORPORATION. UNIVERSAL MATCH CORPORATION is a principal competitor of VENDO. NATIONAL REJECTORS, INC. manufactures slug rejectors, a device used in all or substantially all coin operated machines, to detect, separate, and reject spurious coins and accept legitimate coins. Prior to VENDO's participation in the conspiracy, VENDO was the largest customer of NATIONAL REJECTORS, INC. On or about October 1, 1959, VENDO executed a contract with COIN ACCEPTORS, INC., a Missouri corporation, in which it was agreed that certain employees of COIN ACCEPTORS, INC. would design coin handling devices and VENDO would manufacture them. VENDO also obtained an option to purchase 50% of the COIN ACCEPTORS, INC. stock for a price of

$200,000. When VENDO ertered into the aforesaid contract, it knew that the principal officers, employees and shareholders of COIN ACCEPTORS, INC. were or had been former employees of NATIONAL REJECTORS, INC. and knew that these employees had stolen the valuable trade secrets of NATIONAL REJECTORS, INC. The various agreements, contracts and understandings between VENDO and COIN ACCEPTORS, INC. are in violation of Sections 1 and 2 of the Sherman Act in that they unreasonably restrain trade and constitute an attempt to monopolize the vending machine manufacturing industry, consistent with its intent and purpose as hereinbefore alleged. The aforesaid conspiracy further demonstrates VENDO's intent and purpose to monopolize the vending machine manufacturing industry and to eliminate competitors.

12. On or about April 3, 1959, pursuant to its plan and intent to monopolize, VENDO acquired substantially all of the assets of the STONER MFG. STONER INVESTMENTS is a corporate successor to STONER MFG. Unknown to the plaintiffs, HARRY B. STONER and STONER INVESTMENTS, one of the reasons for the acquisition of the assets of the STONER MFG. was to utilize the facilities of the STONER MFG. for the manufacture of coin rejectors, pursuant to the illegal conspiracy between VENDO and COIN ACCEPTORS, INC. which has been alleged in the previous paragraph of this complaint. The facilities of STONER MFG. are now operated as a division of VENDO. STONER MFG. at the time of the acquisition of its operating assets by VENDO, was one of the leading manufacturers of vending machines for the sale of candy, pastry, cigarettes, coffee, hot food and other similar items. STONER MFG. division of VENDO has continued to manufacture such machines. Largely as a result of these monopolistic activities, VENDO now maintains control of between 50 and 100% of the manufacture of vending machines for the vending of candy, pastry, milk and ice cream and of multi-purpose (refrigerated and non-refrigerated) food vending machines, which is the field in which LEKTRO-VEND has attempted to compete with VENDO. This acquisi-

tion was made pursuant to VENDO's plan and scheme to monopolize the vending machine manufacturing business.

13. The contract of sale between VENDO and STONER MFG., Exhibit A attached hereto, contains an agreement that STONER MFG. would not directly or indirectly compete with VENDO in the United States or any foreign country in which VENDO or any affiliate or subsidiary is operating for a period of 10 years from the date of closing. The full text of the non-competition covenant is set forth in section 15 of the agreement. The said non-competition covenant constitutes an unreasonable restraint of trade, and the making and entering into of said non-competition covenant is an overt act of VENDO in monopolization and constitutes an attempt to monopolize the trade or commerce among the several states and foreign countries in the manufacture of such vending machines. Said non-competition covenant is not reasonably related to the sale of assets referred to.

14. On or about June 1, 1959, a contract was executed between HARRY B. STONER and VENDO. The contract purported to employ the said STONER for a period of five years at a salary of $50,000 per year. The agreement also provided that for a period of five years after the termination of the purported employment, STONER would not enter into or engage directly or indirectly in the vending machine manufacturing business in any of the territories in which VENDO or its subsidiaries or affiliates was conducting business or in which STONER knew VENDO may in the future conduct business. Section 5 of the contract, attached hereto as Exhibit B, contains the non-competition provision. The said non-competition covenant is an unreasonable restraint of trade in that it is not reasonably limited as to time or geographical extent. The said purported employment and election of STONER as a director of VENDO and as an officer of the STONER MFG. Co. division were devices of VENDO to prevent the said STONER from engaging in competition with the defendant, and for no other reason. During the term of such purported employment, the said STONER was neither

assigned nor permitted to perform any duties or responsibilities of an executive or advisory nature. He was informed that his employment by VENDO was a means or device to put him "on the shelf." During the term of said purported employment contract STONER did not learn and was not permitted to learn any trade secrets, know-how or other details of the business which would be of any value to a competitor or in the operation of a competitive business. In 1964, STONER was not re-elected as a director of VENDO and the relationship was terminated in June, 1964. The said non-competition covenant constitutes an unreasonable restraint of trade, and the making and entering into of the non-competition covenant is an overt act of VENDO in monopolization and constitutes an attempt to monopolize the trade or commerce in the State of Illinois, among the several states and with foreign countries in the manufacture of vending machines, particularly food vending equipment.

15. In the period immediately preceding the negotiations for the sale of STONER MFG., STONER was seriously ill and unable to participate actively in the business. His physical condition was such that he could not be certain that he would ever to able to return to active business. In order to assure continued success of the business and to protect the interests of his family and other shareholders of STONER MFG., it was necessary for him to sell the assets of STONER MFG. In the negotiations, VENDO originally proposed a five-year covenant not to compete but during the final stages of negotiation, VENDO insisted that STONER MFG. agree not to compete with VENDO in any area where VENDO was doing business or intended to de business for a period of ten years. VENDO also insisted that STONER individually enter into an employment contract, containing a similar ten-year covenant not to compete. Because of the compelling necessity to STONER of completing the sale, STONER and STONER MFG. were forced to accede to VENDO's demands. The primary purpose of said employment contract, Exhibit B, was to prohibit the said STONER from competing with VENDO not only while payments were made

thereunder but for five years thereafter, which purpose was concealed from STONER at the time said contract was executed and for a substantial period thereafter. In fact, representations were made to STONER after said contract was executed assuring him that VENDO would not attempt to prevent him from entering into a competitive business, which representations were calculated to conceal VENDO's true intent from STONER and others. Said representations were relied upon by STONER. STONER, in or about December, 1962, and on other occasions, requested VENDO to release him from the illegal covenant not to compete, which release was refused by VENDO. On each such occasion, STONER informed VENDO that said covenant not to compete was invalid and unenforcible. Non-competition agreements world wide in geographic scope and for extended periods of time, are and have been weapons in Vendo's arsenal of power and have been used to limit and eliminate competition and to extend and perpetuate its monopoly.

16. Since leaving VENDO in June, 1964, STONER has, without compensation, devoted some time and effort to assist LEKTRO-VEND, particularly in the area of the research and development of vending machines designed for use in the vending of candy bars, mints, and gum, which LEKTRO-VEND has sought to market in the State of Illinois and elsewhere under its name. STONER INVESTMENTS purchased approximately 25% of the common stock of LEKTRO-VEND in July, 1964.

17. On or about August 10, 1965, VENDO filed suit in the Circuit Court for the Sixteenth Judicial Circuit of Illinois against STONER and STONER INVESTMENTS. The full text of the complaint is attached to this complaint as Exhibit C. The complaint alleges that STONER had breached his agreement not to compete of June 1, 1959 and that STONER INVESTMENTS had breached that portion of the April 3, 1959 contract of sale which sought to eliminate competition for 10 years throughout the world. As has been previously alleged, the world-wide non-competition covenants contained

in the said contracts are illegal and in violation of the antitrust laws of the United States, particularly Sections 1 and 2 of the Sherman Act. The purpose of the said law suit is to unlawfully harass STONER and STONER INVESTMENTS and to eliminate the competition of STONER, STONER INVESTMENTS and LEKTRO-VEND. The lawsuit is part of VENDO's plan to monopolize the vending machine manufacturing business. The threats to enforce such non-competition covenants and the bringing of a suit in an attempt to enforce the illegal covenants are overt acts of VENDO in monopolization and constitute an attempt to monopolize the trade or commerce in the State of Illinois among the several states and foreign countries in the manufacture of such vending machines. LEKTRO-VEND, STONER and STONER INVESTMENTS have been injured in their business and property as a direct and proximate result of these overt acts of VENDO.

18. Pursuant to its plan of monopolization within the past year, VENDO's sales representatives and employees have spread false and malicious rumors to the effect that LEKTRO-VEND was in financial difficulties, was unable to perform its contracts for the manufacture and sale of vending machines or to service such machines after delivery and was actually insolvent and on the verge of bankruptcy, and by other means of unlawful trade interference and unfair competition. LEKTRO-VEND's sales of vending machines substantially decreased as a proximate result of the false statements made by VENDO's employees and by other types of unlawful harassment. The purpose and intent of the VENDO's activities is and has been to eliminate competition in the manufacture of vending machines and, specifically, to eliminate the competition of LEKTRO-VEND.

19. Pursuant to its plan of monopolization and with the intent to monopolize, VENDO has threatened to sue and has sued competitors for alleged violations of contracts and alleged patent infringement. In great part these threats and suits have been without merit and solely for the purpose of harassment. The purpose and intent of the threats

to initiate expensive and time-consuming litigation with regard to certain narrow and weak patents held by VENDO and to enforce illegal non-competition covenants is and has been to eliminate competition and drive competitors out of business.

20. Pursuant to its plan to monopolize and with the intent to monopolize, on or about July 31, 1964, VENDO's wholly owned subsidiary, VENDO MANUFACTURING CORP. of New York, a New York corporation, organized on July 30, 1964, acquired all of the vending machine manufacturing assets and patents of CONTINENTAL VENDING MACHINE CORP., an Indiana corporation, and CONTINENTAL APCO, INC., a New York corporation, and wholly owned subsidiary of CONTINENTAL VENDING MACHINE CORP. The manufacturing facilities of the CONTINENTAL VENDING MACHINE CORP. were at the time of purchase and are sufficient to assemble various types of automatic coin operated vending machines which dispense soft drinks, coffee, cigarettes, and ice cream. The trustees in bankruptcy from whom such assets were purchased were prepared to sell the assets to the KELSEY-HAYES CORP. a Delaware corporation, which is a major manufacturer of automobile and aircraft parts. In order to prevent KELSEY-HAYES CORP. or any other corporation from entering into competition with it, VENDO, to extend its monopoly and eliminate competition, outbid the prospective purchaser, thereby avoiding the entry of an additional competitor into the market.

21. Largely as a result of VENDO's unlawful monopolistic activities and practices as previously alleged, its net profit has increased from approximately $840,000 in 1955 to $3,500,000 in 1964. During the same period, VENDO's net sales increased from approximately $20,800,000 to $63,540,000, and its total assets increased from approximately $10,950,000 to $50,460,000. During the first six months of 1965, the VENDO's total sales were $38,869,153, a 35% increase over the same six month period for the prior year. During the first six months of 1965, earnings

were $2,456,150, an increase of 66% over the same period from the prior year. Sales made by the CONTINENTAL VENDING MACHINE CORP. division made a substantial contribution to such sales and earnings. In or about July, 1965, VENDO put in effect a broad-based price increase, averaging around 10%. The purpose and intent of the aforesaid monopolistic practices is and has been to acquire sufficient economic power to exclude competitors from trade and commerce among the several states and foreign countries, to eliminate competition in the State of Illinois, and to deter potential competitors from beginning the manufacture of vending machines in the State of Illinois and elsewhere.

22. Largely as a proximate result of VENDO's unlawful monopolistic activities and practices and its attempts to monopolize the manufacture and sale of vending machines as previously alleged, VENDO has made it substantially more difficult to enter the vending machine manufacturing business and competition has substantially lessened, and eliminated in some instances, and there has been a dangerous probability of a monopoly in the manufacture of vending machines. In 1958, there were approximately 120 vending machine manufacturers. In 1963, this was substantially reduced to 76 such manufacturers, and in 1964, the number of manufacturers had been further reduced to 66. Of these 66 companies, 47 had sales in excess of $100,000. In 1964, approximately 31 companies manufactured vending machines for confections and food, but only 16 of them had sales in excess of $100,000. In 1964, twelve companies manufactured vending machines for candy bars; eight of these had sales in excess of $100,000. LEKTRO-VEND has been seriously injured as a proximate result of VENDO's unlawful monopolistic practices, activities, and its exercise and attempted exercise of its monopoly power.

23. As a result of the commencement of the action in the Sixteenth Judicial Circuit of Illinois and of the other acts as alleged previously, the plaintiffs, STONER and STONER INVESTMENTS have not been able to participate to the fullest

and have been unlawfully prevented from constructively utilizing their knowledge and abilities in the industry, to the damage of the industry as a whole, the consuming public, LEKTRO-VEND, and themselves. The enforcement of the world-wide non-competition covenants contained in the contracts with VENDO should be enjoined as a violation of the United States Antitrust Laws, particularly Sections 1 and 2 of the Sherman Act, and plaintiffs should be awarded their costs and reasonable attorney's fees.

24. STONER has been unable, because of the existence of said non-competition covenant, to obtain suitable employment in the business of manufacture and sale of vending machines, since the termination of payments by VENDO in June, 1964, and will be unable to secure any such suitable employment in the industry, or to use his extensive knowledge and ability in the industry, until the threat of such unlawful covenant is removed. STONER could reasonably expect to earn upwards of $75,000 per year in such employment. As a direct consequence thereof, and of the pendency of the Illinois action, for the defense of which STONER has been forced, and will in the future be forced, to make substantial expenditures, STONER has sustained damages of in excess of $100,000 to date.

25. STONER INVESTMENTS has been unable, because of the existence of said world-wide non-competitive covenant, to invest in or otherwise participate in the business of the manufacture and sale of vending machines. Had it been free to participate in such business and to invest funds therein, it could have realized a profit from such participation and investment of in excess of $200,000 per year. It requested its release from the illegal covenants not to compete in or about December, 1962, which release was refused by VENDO. As a proximate result thereof, and as a direct result of the pendency of the Illinois action, for the defense of which it has been forced, and in the future will be forced, to make substantial expenditures of money and

utilize the time of its employees, STONER INVESTMENTS has been damaged in an amount in excess of $500,000.

26. As a direct and proximate result of the violations heretofore set forth LEKTRO-VEND has been substantially injured in its business and property, to wit: LEKTRO-VEND has been deprived of the services of STONER and the financial assistance of STONER INVESTMENTS; its sales and profits have been seriously impaired and reduced; it has suffered an immense loss of good will and reputation; and the value of its business has been substantially reduced; all to the damage of LEKTRO-VEND. The precise amount of damage is not presently known to LEKTRO-VEND, but is believed to be in excess of $3,000,000.

27. Plaintiffs, and each of them, allege that the foregoing violations of the antitrust laws by VENDO are presently continuing, and further irreparable loss and damage are threatened to plaintiffs, and each of them, unless VENDO is restrained by this Court.

WHEREFORE, the plaintiffs pray:

1. That this Court adjudge and decree that the acts of VENDO as hereinabove described have been and continue to be in violation of the antitrust laws, including Sections 1 and 2 of the Sherman Act;

2. That this Court issue a permanent injunction against VENDO restraining it from continuing the unlawful practices alleged herein;

3. That STONER be awarded damages against VENDO in the amount of $100,000 to be trebled to $300,000 as provided by law;

4. That STONER INVESTMENTS be awarded damages against VENDO in the amount of $500,000 to be trebled to $1,500,000 as provided by law;

5. That LEKTRO-VEND be awarded damages against VENDO in the amount of $3,000,000 to be trebled to $9,000,000 as provided by law;

6. That plaintiffs, and each of them, be awarded attorneys' fees, costs and interest as provided by law.

7. That plaintiffs, and each of them, have such other, further and different relief as the Court shall deem just.

LEKTRO-VEND CORP., a Delaware corporation, HARRY B. STONER, and STONER INVESTMENTS, INC., a Delaware corporation,

By: .....
James E. S. Baker

.....
Robert A. Downing
Their Attorneys

Of Counsel:

SIDLEY, AUSTIN, BURGESS & SMITH
11 South La Salle Street
Chicago, Illinois 60603
STate 2-5400

Answer, Separate Defenses And Counterclaim In Vendo Co. v. Stoner (state court suit)
(Filed October 25, 1965)

[CAPTION OMITTED IN PRINTING]

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SIXTH SEPARATE DEFENSE

The non-competition covenants referred to in paragraphs 4 and 5 of the complaint sought to be enforced by the complaint are invalid and unenforcible because they are in violation of the United States antitrust laws (Title 15, U.S. Code, Sec. 1-8, *et seq.*), particularly Sections 1 and 2 of the Sherman Act, in that such covenants are not reasonably related to the sale of assets referred to, nor to the employment of the individual defendant. The plaintiff, The Vendo Company, has monopolized, and attempted to monopolize, the trade and commerce among the several states in the business of manufacturing and selling automatic coin merchandising machines, generally known as vending machines, and has acquired as the result of its activities control over so substantial a portion of such trade and commerce as to obtain the power to remove or to exclude competitors from the field of manufacture of vending machines. That it now possesses such power and that its bringing of this suit in an attempt to enforce the non-competition covenants referred to in paragraphs 4 and 5 of the complaint, demonstrates its intent to exercise its power to remove or exclude competitors from competition in the vending machine manufacturing business. At the present time plaintiff has control of over 40% of the entire vending machine manufacturing business of the United States and has control of the manufacturing of between 50% to 100% of the vending machines for the vending of candy, pastry, milk, and ice cream, and of multi-purpose, refrigerated and non-refrigerated, food vending machines, which is the field in which Lektro-Vend Corp. has attempted to compete with

plaintiff. The making and entering into of the purported non-competition covenants referred to in paragraphs 4 and 5 of the complaint, the reiteration of threats of enforcement of such covenants, and the bringing of the present action in an effort to enforce such covenants, are overt acts of plaintiff in monopolization and attempts to monopolize the trade or commerce among the several states in the field of manufacture of such vending machines. Such purported non-competition covenants constitute contracts in unreasonable restraint of trade or commerce among the several states and are, therefore, invalid and unenforceable.

Wherefore, defendants, and each of them, demand that the complaint and each Count thereof should be dismissed and that they should be awarded their costs.

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Amendment To Complaint In
Vendo Co. v. Stoner (state court suit)
(Filed January 28, 1966)

[CAPTION OMITTED IN PRINTING]

COUNT I

7. That the defendant, Harry B. Stoner, both during the term of his employment by the plaintiff and thereafter, but within the five (5) year period specified in the contract, violated and breached his duties and obligations thereunder in that he has both directly and indirectly entered into the vending machine manufacturing business individually, as a partner, officer, stockholder, or joint venturer, in the Lektro-Vend Corp., a foreign corporation; that plaintiff is unaware of the exact nature and extent of defendant Stoner's interest therein; that the defendant, Harry B. Stoner, during the term of his employment, stole valuable trade secrets of the plaintiff, including design concept for vending machines, which he appropriated during the term of his employment and thereafter to his own use and that of the Lektro-Vend Corp.; that during the term of his employment, and thereafter, through the provision of financing, advice and the use of facilities, entered into the vending machine manufacturing business with Lektro-Vend Corp., a foreign corporation.

8-½. That the defendant, Harry B. Stoner, is a man of substantial means and has income from investments in excess of Fifty Thousand Dollars ($50,000.00) per year; that compliance with the terms of his contract with the plaintiff, heretofore referred to, will not in any way prevent him from earning a livelihood or from enjoying the standard of living to which he has become accustomed.

COUNT II

8. That the defendant, Stoner Investments, Inc., in violation of its obligations and duties pursuant to the afore-

said contract, has indirectly engaged and participated in the ownership, management, operation and control of the business of the manufacture and sale of vending machines by consenting to and actively permitting its facilities, officers, agents and employees to be used by said Lektro-Vend Corp. in the sale and manufacturing of vending machines in competition with the plaintiff, The Vendo Company; that the defendant, Stoner Investments, Inc., in violation of its contractual obligations, managed, operated, controlled and participated in the ownership, management, operation and control of the Lektro-Vend Corp., a foreign corporation, by the provision of financing, advice and the use of facilities afforded the aforesaid Lektro-Vend Corp.; that through its officer and agent, Harry B. Stoner, the defendant, Stoner Investments, Inc., stole valuable trade secrets of the plaintiff, The Vendo Company, including the design for certain vending machines, which it appropriated to its own use and that of Lektro-Vend Corp.

/s/ Reid, Ochsenschlager, Murphy & Hupp
Attorney for Plaintiff

[CERTIFICATE OF SERVICE
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**Amendment To Complaint In
Vendo Co. v. Stoner (state court suit)**

[CAPTION OMITTED IN PRINTING]

MOTION TO AMEND
(Filed June 26, 1966)

Now comes the plaintiff, The Vendo Company, a foreign corporation, by Reid, Ochsenschlager, Murphy and Hupp, its attorneys, and moves the Court for leave to amend the Complaint instanter upon its face for the purpose of adding the following language at the end of Count II:

> The plaintiff, The Vendo Company, a foreign corporation, further prays that the defendant, Stoner Investments, Inc., be restrained by an Order of this Court during the pendency of this litigation and thereafter by an Order of Injunction from owning, directly or indirectly, managing, operating, joining, controlling or participating in the ownership, management, operation or control of, or from being connected in any manner with, and from directly or indirectly entering into or engaging in the manufacture and sale of vending machines in the United States or any foreign country in which Vendo, or any affiliate or subsidiary, is so engaged until June 1, 1969.

/s/ Reid, Ochsenschlager,
Murphy & Hupp
Attorneys for Plaintiff

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ORDER

This matter coming on to be heard on the plaintiff's Motion to Amend the Complaint on its face, instanter, and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1.) That the plaintiff is hereby granted to leave to file the amendment proposed to the Complaint instanter and on its face.

2.) That the defendants are hereby granted 10 days within which to answer or otherwise plead.

Enter This 23 day of June, 1966.

/s/ CHARLES G. SEIDEL
Judge

Opinion Of The Trial Court In The Vendo Co. v. Stoner, *et al.*, No. 65-2134, In The Circuit Court For The 16th Judicial Circuit, Kane County, Illinois

[The trial court, on December 16, 1966 after hearing closing arguments, delivered the following oral opinion from the bench and ruled on the case, as follows:]

The Court: Well, this has been a lengthy case, but it is not the only lengthy case that I have just concluded. I am reminded of the common instruction that we give all juries, that we are to exercise our common sense and good judgment gained from our observation and experience in the affairs of life.

I take it that applies to judges who try cases involving corporation against corporation and their various methods of buying their competitors' products for the purpose of analysis and comparison, and duplication, and many other things that had never occurred to me, perhaps, prior to having such litigation presented in front of me.

But in this case I have had the benefit of competent counsel who have worked hard and diligently in preparing the Briefs. I did read some of the actual testimony previously. But, as I requested you gentlemen during the summer to collaborate and come up with an Abstract of testimony which would eliminate a great deal more work on my part, I am most grateful for your having done so. It was very illuminating to me to read and reread certain portions of that Abstract.

I think I should also comment on one other feature that is apparent in every case and that is: The Court or the Jury has the sole responsibility of judging the credibility of the witnesses and the manner in which they testify, their interest, lack of candor, and general appearance in the courtroom, where I am sure that the appeals courts are never fully aware of the facemaking or head shaking that goes on during the course and conduct of a trial.

I am also aware that as counsel sit at the counsel table that they are not always aware of what goes on in back of them, whether it is to their favor or to their disfavor. But the Court quite frequently follows the witnesses in their spoken word as well as observing the expressions that appear and mannerisms in the courtroom.

I have been thoroughly interested in the Briefs that you have prepared and the material covering the law.

I think as the record now stands I have previously ruled that I didn't think your Affirmative Defenses of the anti-trust phase of this case, either the application of the Federal act or the State act, had any applicability in this case.

I don't know whether that is reflected in an Order or not, but it should be.

Mr. Baker: We had no Order dismissing it.

The Court: Well, I wanted to repeat myself so there would be no doubt about the status of the record.

Now, in reviewing the testimony that was given, there are a number of conflicting statements. Mr. Ochsenschlager has characterized the conduct of Mr. Stoner—or the theory of the Stoner defense as unbelievable. I presume everyone has the prerogative of using whatever descriptive language he sees fit to use, but it is a little amazing to me.

I might say that I have had the experience of being a corporate director and also being a corporate president. So I think I have some understanding of what is the responsibility of an officer, and I am sure I am fully aware of the responsibility of a director.

It was always my feeling that I was acting in a fiduciary capacity for the benefit of all stockholders. And even though I, in one instance, wanted to make a complete disbursal of all of the assets of a company, I felt that I couldn't undertake to do this because if I were to do it I'd be assuming a personal responsibility to a very contingent creditor that I just couldn't afford to assume.

But in this case when you consider the testimony as to the entering into of this agreement of sale and the employment agreement, I take into consideration that neither counsel engaged in the trial of this case were present or participated in these agreements. And as has been pointed out, each case must stand upon its own particular set of facts.

The very case which Mr. Baker has cited in the prior arguments which I recall and have had occasion to reread a number of times was the Parish v. Schwartz case. There they cite with approval the Lanzit case, which, again, Mr. Baker commented on. And you will find in that case the statement which says that a contract which is only in partial restraint of trade will be held valid if it is reasonable and has a valuable consideration to support it.

I don't remember whether Counsel cited the case or whether the Court did, but I have always been conscious of Justice Schaefer's opinion in the case of Bauer v. Sawyer. That was the doctors' case where he had agreed to practice medicine in Kankakee and the one doctor saw fit to withdraw. And as I remember the language there, the Justice said that he didn't think it would make too much difference if there was one less doctor practicing in Kankakee.

It is my understanding that these agreements are enforceable if they are reasonable both as to area that they purport to cover and as to the time that they purport to cover.

In this case, the time was fixed, it is my recollection, for a ten-year period. Counsel cite the case of Reuben H. Donnelly Corporation v. United States, 257 F. Supp. 747, and it is my understanding that in that case a ten-year period was held not to be unreasonable.

Now, there have been many discussions in the last year in seminars that I have attended, both here in Illinois and elsewhere, about perhaps changing the dead-man statute to

permit testimony if someone is deceased. In this particular case, Mr. Stoner has seen fit to characterize these contracts as void and not worth the paper they are written on. But having been admitted to the Bar of the State of Illinois with the late Ed Streit, never having tried a case with him but having tried enumerable cases on the opposite side of the counsel table from him, I recognize his ability and his integrity as an attorney.

But even in that statement if we were to accept that statement as being truthful, I think I should also point out the absolute contradictory statement of Mr. Stoner when he goes to the Vendo corporation according to his testimony and states that some of the men thought that he would be released from his contract. But then he appeared at the last board of directors' meeting that he did attend and requested the release of his employment contract and was told by Mr. Pierson that perhaps that was a matter that the board would have to pass on and that it would be his recommendation as the president that he not be released from the terms of his employment contract, which to me is only consistent with an obligation that a president would have in any corporation. While it wasn't spelled out letter for letter, I take it the consensus of the Board meeting was that Mr. Stoner was not released from his agreement.

So you have those inconsistent statements in the record. Then you have the conduct of the defendant, Mr. Stoner, himself. And it is coincidental, the men who were employed by Mr. Stoner in the Stoner Manufacturing Company; namely, Mr. Jack Stewart, who was well known to, I think, all of the lawyers in Aurora having been the operator of a downtown clothing store for many years and a rather affable gentleman. Some of the other men were unknown to us, Mr. Lazzara, Mr. Phillips, Jr. and Sr. Mr. Kaman was only there a short while, but did not go with the Stoner Investments, Inc., but went with the Skil Corporation it was my recollection.

And then when you consider the testimony in the light of the Phillips going into the business of making a coin changer and vending machine and the several meetings that took place between the planing department of Vendo and those engaged in the Stoner Company and the similarity of the devices, which was apparent to me—I am not a patent lawyer—, it didn't seem to me to take any great ingenuity to come up with an idea of making something that would be usable and, perhaps, saleable.

As to the loans by Mr. Stoner to the Phillips, Mr. Baker will say, "A mere loan is not violating the terms of an agreement." And I take it that that would be a correct statement of the law if it were strictly a personal loan not for the purpose of engaging in a like or similar business venture of one you had just sold your business to.

Another factor that I think is somewhat amazing is the fact that Mr. Stoner knew of this undertaking of the Phillips to put together a vending machine and his discussion with The Vendo Company as to the possibility of their acquiring this particular machine.

I have searched this record and the evidence to ascertain whether I had missed something; but nowhere, did I find out any disclosure by Mr. Stoner that he had financed this undertaking, unless, perhaps, if at all, I think Mr. Stoner's words were that he didn't think that he told anyone.

But I asked myself the question: What is the responsibility of a man who is in a position of trust and a fiduciary capacity to the stockholders? Some of these stockholders were members of his own family at one time or another. I find it most difficult to come up with an answer that that sort of conduct is conducive and in compliance with the responsibility as a director of a corporation.

Now, there is another matter of evidence which none of you gentlemen have touched on today. I doubt that you did before because I am sure the witness had not previously testified. And that was the witness Mr. Cayne, whose testi-

mony was to the effect that he had represented Stoner. He said, "Stoner"; he didn't say, "company." But it is my understanding that he also represented Mr. William Phillips, Mr. Rod Phillips, and Mr. William Callahan, who was, likewise, an employee of Stoner and Vendo, in prosecuting and procuring a patent for an electrically operated merchandise vending machine. That was found at page 1331 of the testimony and page 288 of the Abstract.

On page 299 of the Abstract and at page 1384 of the testimony, Mr. Cayne testified that he had known Harry Stoner since 1930, and he knew Rod Phillips, and he worked for Stoner, and he knew William Phillips, and he handled the prosecution of the electronic coin detecting device for Bill Phillips. (Reading)

> "I did it for him, he was the one who came to me, and I think it was for the Phillips Company. He did not tell me when he first came to me that this was going to be assigned to Stoner Investments, Inc. I prepared the document of assignment of the patent from William Phillips to Stoner Investments, Inc., having been told of the assignment by either Bill Phillips or Rod Phillips."

Now, I don't think that a Judge or a Jury can put their head in the sand and ignore statements in the evidence that you hear.

But the fact of these loans, the fact of the sale of a business—or not of a business, but of a building, the testimony of a disinterested witness of the visits of Mr. Stewart, and Mr. Lazzara, and the Phillips to the building before it was completed, I think in one case the statement was made it was being erected for the Phillips Company which apparently is known as Lektro-Vend—I find myself asking a number of questions of myself:

Whether or not the conduct of the individual defendant is consistent with his obligations as a director in a corporation which wasn't paying him a nominal salary. In fact,

it is a salary that is much more than you find in other like endeavors, although I guess today some corporate presidents and sales managers are paid astronomical figures. But $50,000.00 a year is not exactly a nominal salary. And as one of the men from Missouri stated—I like to refer to those individuals as show-me boys because I guess that is what they call the people that come from that state—one of them said, "We sort of felt we ought to get a quid pro quo," which comes back to some of our basic concepts of contractual duties.

Being mindful that this is an equity case in which the burden of proof is not the same as in a criminal case or perhaps in a strict case of law, but it is addressed to the equitable conscience of the Court, I have pointed out that I didn't think a ten-year period was out of line based upon decisions. I have pointed out that the restraint of trade —partial restraint of trade, if any, is something that I don't find myself giving too much concern.

I think you gentlemen can understand the reasoning for that because in the record here it is replete with various names, many of which I can't recall at this moment; but there was Seeburg, there was U-Select-It, there was Rowe, there was Canteen I believe. And, again, as I say, you don't set aside your observation and experience in life. And as you drive around the streets of a town or village, sometimes you see signs of buildings that advertise people who are making canteens or vending machines. So that I don't believe that I should bother myself with the possibility of the public being injured in such a case as has been presented to me.

Again, Mr. Stoner in his testimony referred to the fact that Vendo was making a lot of money. And if you are to follow his suggestion or innuendo, they would have made more money.

But again you can't overlook the testimony of Mr. Popp, whose testimony as I recall it was that he received a tele-

phone call from Mr. Stoner and that he stopped at Mr. Stoner's mother's home. And quoting the words of Mr. Popp, "Mr. Stoner felt that he had made a bad deal and he wanted to get out of it."

Then within a week as I recall, Mr. Popp received a telephone call from the late Edward Streit that they were taking out various items of tools or equipment out of the Stoner then Vendo Company and that he, Popp, went to the company and that he, Popp, called the Vendo Corporation in Kansas City to inquire of them what, if anything, they were going to remove and as I recall the testimony it was a shear.

Now, in these cases, I think both in the Parish case and in the doctor case, the Court commented upon the fact that it was a difficult question to arrive at a damage figure. And I have asked myself the question, "What would twelve people do if they had heard this case and they were called upon to arrive at a damage figure?"

We have valuations placed on this machine by Mr. Stoner. In fact, he recommended the payment of a million and a half dollars to Vendo for the Phillips machine. On the other hand, I think it was Mr. Andrews who testified that in his judgment it would cost somewhere between three and four hundred thousand dollars to do the tooling and designing to produce this particular machine. I am satisfied the record is replete with statements. I believe Mr. Childers made the statement that they were interested in this machine as an adjunct to their existing line of equipment, but not at the figure of a million and a half dollars.

Mr. Ochsenschlager has suggested the loans by Mr. Stoner of $250,000.00 for the tooling and designing to put this machine together. Those are figures that a Jury might take into consideration.

I think while I am commenting on it, I should also comment that it is unusual that you do find people who loan money without interest. I have never been in that category.

And then coupled with that, the sale of this building and the sale to a new corporation with no sales experience and the guarantee—I have forgotten whether that was the personal guarantee of Mr. Stoner or the guarantee of Stoner Investments, Inc.

But taking those factors into consideration together with the payment of the salaries to these men while they were working on this machine which the defendant Stoner attempted to sell to the company that he was a director in to me just seems to run contrary to my concept of equity and good conscience and my concept of what constitutes a legal and binding agreement, an agreement for the sale of a business and an employment agreement.

Mr. Baker pointed out that this agreement was worldwide and that that was primarily for the benefit of Vendo corporation. But in the same breath in fairness to Mr. Baker, he did point out in fairness to me that the Stoner corporation was doing business throughout the United States and had had some foreign negotiations. Whether they had ripened into licensing agreements from which there was money coming, I am not certain from a reading of the record.

I take it first I should grant the prayer to amend your Complaint for ad damnum. My understanding is under the Practice Act that can be done either before or after a jury verdict or after the Court's decision.

So that it is my finding that an injunction will issue against Harry Stoner and against Stoner Investments, Inc.

There will be a judgment of $250,000.00 against Harry Stoner personally and a judgment of $1,100,000.00 against Stoner Investments, Inc., and Harry Stoner.

If you gentlemen will, collaborate on the order. When you have done that, prepare it and it will be signed.

Mr. Ochsenschlager: Okay; suppose we continue it for the draft order. Or do you want that done today?

The Court: Whatever your pleasure is.

Mr. Baker: I'd like to have a chance to look it over and see it.

Mr. Ochsenschlager: Your Honor, we'd like to ask it be continued for the order. And we will submit it to Mr. Baker in the meantime.

The Court: All right; you want it continued to a day certain?

Mr. Ochsenschlager: A week from today?

Mr. Baker: A week from today is the day before the Christmas Holiday. I suggest it not be a week from today. Sometime the first week in January, maybe that would be reasonable or between the holidays.

Mr. Ochsenschlager: Judge, let us continue it until supposing next Wednesday. Mr. Baker, by that time we will agree. We will submit it to you and whatever time we can agree on after that; but you won't have to be out here on that day.

Which Were All Of The Proceedings Had On The Hearing Of Said Cause.

[CERTIFICATE OF COURT REPORTER
OMITTED IN PRINTING]

First Judgment In Vendo Co. v. Stoner
(Entered December 27, 1966)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

THE VENDO COMPANY **vs.** **HARRY B. STONER** **and STONER INVESTMENTS, INC.**	**No. 65-2134**

JUDGMENT

This matter coming on for a hearing on the merits, and the Court having heard testimony and having received evidence, and having heard the arguments of counsel, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged And Decreed as follows:

1. That the plaintiff, The Vendo Company, a Missouri corporation, do have and recover of and from the defendant, Harry B. Stoner, the sum of Two Hundred Fifty Thousand Dollars ($250,000) and costs, and have execution therefor.

2. That the plaintiff, The Vendo Company, a Missouri corporation, do have and recover of and from the defendant, Harry B. Stoner and Stoner Investments, Inc., a Delaware corporation, the further sum of One Million One Hundred Thousand Dollars ($1,100,000) and costs, and have execution therefor.

3. That defendant Harry B. Stoner be, and he is hereby, restrained and enjoined from engaging, directly or indirectly, in the vending machine manufacturing business, individually or as a partner, employee or agent, anywhere in the United States or in

any foreign country in which The Vendo Company engaged in such business (as of June 1, 1959), until June 1, 1969.

4. That defendant Stoner Investments, Inc., be and it hereby is, restrained and enjoined from engaging, directly or indirectly, in the manufacture and sale of vending machines in the United States and in any foreign country in which The Vendo Company engaged in such business (as of June 1, 1959), until June 1, 1969.

5. That the issuance of any execution or writ of injunction pursuant hereto is stayed for a period of 30 days from the date hereof.

Enter this 27th day of December, A.D., 1966.

/s/ John S. Petersen
Judge

Opinion of the Illinois Appellate Court for the Second Judicial District in Vendo Co. v. Stoner, 105 Ill. App. 2d 261, 245 N.E. 2d 263 (1969)

THE VENDO COMPANY, a Foreign Corporation, Plaintiff-Appellee, v. HARRY B. STONER and STONER INVESTMENTS, INC., a Foreign Corporation, Defendants-Appellants.

GEN. NO. 68-1.

Second Judicial District.

January 30, 1969.

Rehearing denied March 24, 1969.

MR. JUSTICE SEIDENFELD delivered the opinion of the court.

Defendants, Harry B. Stoner and Stoner Investments, Inc., appeal from judgments in a suit for breach of a sales and employment contract and for injunctive relief, heard without a jury.

Judgment was entered in favor of the plaintiff and against the defendants as follows: (1) against Harry B. Stoner in the amount of $250,000; (2) against Harry B. Stoner and Stoner Investments, Inc., in the amount of $1,100,000; (3) against Harry B. Stoner, restraining him from "engaging, directly or indirectly, in the vending machine manufacturing business, individually or as a partner, employee or agent, anywhere in the United States or in any foreign country in which the Vendo Company engaged in such business (as of June 1, 1959), until June 1, 1969; and (4) against Stoner Investments, Inc., restraining it in similar terms."

A question is also raised on the pleadings, arising out of the court's order striking certain defenses and counterclaims based upon the Federal and State Antitrust laws.

In April, 1959, the defendant corporation was principally engaged in the business of manufacturing and selling candy vending machines throughout the United States, and was about to license a company to sell its machines in England. This corporation will herein be referred to as Stoner Investments, its present name, notwithstanding that it was named Stoner Mfg. Corp. in 1959. The corporate shares of Stoner Investments were owned in 1959 by defendant Harry B. Stoner, his wife, his mother and his sister-in-law, Ruth Netrey. Mr. Stoner was, without dispute, the principal officer and in control of the management of the corporation.

The Vendo Company, in 1959, had been one of the leading manufacturers and sellers of vending machines for hot and cold beverages, ice cream and certain other products. The company did not manufacture or sell vending machines for candy, cigarettes, hot sandwiches and instant coffee and tea at that time, but such machines had been considered and were in various stages of research and development. Vendo machines were then being sold in 58 countries in every continent. Clearly, Vendo was a considerably larger and more diversified company than Stoner Investments.

On April 3, 1959, a contract was executed by which Vendo agreed to purchase Stoner Investments' assets, excluding real estate and improvements thereon, cash on hand or on deposit, and receivables. In essence, Vendo was to pay $3,400,000 in cash, subject to certain adjustments, deliver 60,000 shares of its fully paid and nonassessable common stock, pay a portion of its profits in excess of $250,000 in any calendar year from the assets being purchased for a period of ten years, pay 25% of monies received from sales outside the United States of Stoner Investments' products, also for a period of ten years, assume responsibility for the collection of accounts receivable, and pay all debts, obligations and liabilities of Stoner Investments. The sales agreement imposed the folowing restriction on the selling corporation:

> "Section 15. From and after the closing, the Company [Stoner Investments] will not own, directly or indirectly, manage, operate, join, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business engaged in the manufacture and sale of vending machines under any name similar to the Company's present name, and, for a period of ten (10) years after the closing, the Company will not in any manner, directly or indirectly, enter into or engage in the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by the Company."

In addition to the sales agreement, an employment contract was executed whereby Mr. Stoner would serve Vendo in an executive capacity for five years, or until June 1, 1964, at an annual salary of $50,000. This agreement also contained a noncompetition clause which reads as follows:

> "5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an

employee, agent or salesman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter."

The employment contract provided that Mr. Stoner "shall regulate his own hours of employment and shall determine the amount of time and effort which he shall devote" to Vendo, and that the value of his services are not to be measured by the time and effort he devotes to the business, but by his advice, counsel, know-how and experience. The contract further provided, inter alia, that Vendo "shall have the right to terminate this agreement upon thirty (30) days' notice in the event of the substantial violation of the terms hereof by Stoner."

There was evidence offered to show that Mr. Stoner, after the signing of the sales agreement but before the closing of the transaction, had second thoughts about the wisdom of the sale. He made statements to this effect to the business representative of the union for the plant's employees, intimating at the time that many of the employees would be losing their jobs and that equipment was being moved out of the plant. It does not appear that the union took any action—other than to investigate—as a result of these conversations.

Almost immediately after the take-over by Vendo, several points of friction developed between Mr. Stoner and certain of Vendo's other executives. Essentially, Mr. Stoner complained that his services were not being utilized, that he was being treated as nothing more than a "figurehead," and that the procedures and employees of Vendo were ineffectual.

For several years prior to the sale to Vendo, R. W. Phillips (Rod) had been the Stoner plant superintendent, and his son, William Phillips (Bill), had been assistant superintendent. Rod was liaison engineer between the engineering and production departments, and participated in design work on a day-to-day basis. Bill had a degree in aeronautical engineering and Navy training in electronics.

Bill resigned from Vendo in June or July of 1960, ostensibly because he was no longer in line to become the plant manager, and because he purportedly disagreed with Vendo's philosophy and attitude concerning product quality. Within two months of his resignation, Bill met with Mr. Stoner and proposed that the latter finance the development by Bill of an electronic coin detecting device which he had conceived, and which would be of considerable value in the ve ing machine as well as in other industries. That discussion concluded with the agreement that Stoner Investments would pay Bill a salary of $650 per month to develop such a device, and any patents thereon would belong to Stoner Investments. Bill's father, Rod Phillips, was present at the time of this conversation.

Working primarily in his basement at home, Bill nearly completed the coin detector by the end of 1960. A patent was issued in October of 1961, and was assigned to Stoner Investments. Except for a "breadboard" model, the coin detector was never produced. Bill received a total of $3,250 as salary from Stoner Investments for his work on the coin detector, and in addition was reimbursed nearly $1,000 for expenses.

Rod Phillips also resigned from Vendo in mid-1960, at about the same time as Bill resigned. Rod's stated reason for leaving was that he resented "spying" on the progress of another company which manufactured slug-rejectors. Rod spent approximately six months after his resignation in retirement, and it was during this period

of time that his son, Bill, was designing the electronic coin detector with the financial aid of Stoner Investments.

In late 1960 or early 1961, when Bill's design of the coin detector was virtually completed, Rod approached Mr. Stoner with the request that Stoner provide sufficient funds to enable Rod to engineer and develop a particular type of vending machine. Mr. Stoner agreed to have Stoner Investments make noninterest bearing loans to Rod for that purpose. According to the testimony of defendants, neither Mr. Stoner nor Stoner Investments was to have any ownership or control in Rod's venture, it being their position that Rod was entitled to this consideration for his many years of loyal service to Stoner Investments. During 1961 and 1962, Stoner Investments loaned Rod Phillips a total of $206,000.

In addition to making the above loans to Rod, Mr. Stoner made available to Rod and Bill in early 1961 an old milk plant building known as the Middle Avenue Building. Rod was charged no rent, but made repairs to the building with materials purchased by Mr. Stoner.

In August of 1961, two other former employees of Stoner Investments — and then employees of Vendo — resigned from Vendo and joined Rod and Bill. Their combined salaries of $1,150 per month were paid by Stoner Investments until December of 1962. One of these men had between fifteen and twenty years of design experience with Stoner Investments prior to the sale to Vendo, and the other had served as a toolmaker.

The vending machine developed by Rod and Bill Phillips was to be used for the vending of candy. There were three characteristics of this machine which contributed to its eventual popularity and acceptance, namely: (1) positive stock rotation, known as first-in first-out, or FIFO, where the first product stocked in the machine would be the first one sold, thus reducing the chance of vending or discarding stale candy; (2) continuous display through a window of the actual product next to be vended; and (3) capacity for

stocking mixed products in a single conveyor, and consequent elimination of the usual necessity to sell out the product before restocking with a different product. Although machines having those features had been on the market for many years, none had incorporated all three of the above characteristics, and in fact no practical machine with all these characteristics had ever been developed previously.

It is one of Vendo's contentions herein that Mr. Stoner's financial participation in the development of this machine amounted to the appropriation of a trade secret of Vendo.

It is uncontroverted that Vendo, before the acquisition of the Stoner plant, had been taking steps with a view toward the development of a FIFO candy vending machine that incorporated a window displaying the actual product to be vended, and which would permit the stocking of mixed products in a single conveyor. The authority for an expenditure on such a project was first assigned by Vendo in December of 1958. This project led to the fabrication of two "developmental mechanisms." Neither of these models included the vend-the-bar-you-see window, although an artist's sketch of a complete machine, having such windows in front of each conveyor, was prepared. There was evidence to show that artist's sketches of Vendo's contemplated machine were shown to Mr. Stoner and Rod and Bill Phillips in early June, 1959, almost immediately after Vendo's acquisition of the Stoner plant.

One of these models was exhibited at a products planning meeting at the Stoner plant on August 3, 1959, at which Mr. Stoner and Rod Phillips were present. At that meeting, the Stoner Division sales manager said the machine was deficient in three respects: (1) the product would have to be stocked upside down; (2) the machine could tip over during loading because all of the conveyors would have to be swung out; and (3) production of the machine would be unduly expensive. The minutes of that meeting stated that the Sales Department "feels the objectives of stock

rotation and visual display are sound but the particular design in question is not acceptable because of loading and inventory problems." These minutes went on to state that Vendo's Research and Engineering Department "is to continue research as to how to basically improve the stock rotation idea so that it can be made practical."

In January, 1960, Vendo's Vice-President in charge of Research and Engineering made a handwritten notation on an interoffice memorandum, stating: "I agree on the need for rotation of stock, but not on [this] unit. I think a better one could be devised." Neither of these models was patented, and a Vendo executive had written patent counsel that "we do not intend to commercialize" these models. In September and October of 1960, Vendo sent both models to Vendo's "morgue" which, according to our reading of the record, is the destination for nonactive—but not necessarily abandoned—projects.

The machine developed by Rod and Bill Phillips was called the Lektro-Vend machine, and while incorporating the three characteristics of first-in first-out, a vend-the-bar-you-see window, and mixed stock in a single conveyor, it differed in many basic respects from the models developed by Vendo. For example, the Lektro-Vend machine was electrically powered while Vendo's was to be mechanically powered; Vendo's machine required approximately 4,000 screws for the shelving mechanism, while the Lektro-Vend machine eliminated these by using a series of L-shaped shelves interconnected with pins; the conveyor in the Lektro-Vend machine moved in a track guided by plastic wheels, while Vendo's conveyor unitized bicycle chain affair with hooks; and the Lektro-Vend machine was loaded by tilting out the conveyor within the machine's center of gravity, thus avoiding the objectionable swing-out loading requirement of Vendo's machine. More significantly, the Lektro-Vend machine was functionally and economically successful, while many undesirable features of the Vendo machine rendered its production impractical.

The first prototypes of the Lektro-Vend machine were exhibited in October, 1962, at a trade show in San Francisco. This machine was accepted so well that another company took its own stock rotation (FIFO) machine off display. In fact, certain officers and directors of Vendo were so impressed with the machine that one of them approached Rod Phillips at the show and discussed the possibility of Vendo purchasing the machine.

It appears that, prior to the show, Rod Phillips had intended to sell the Lektro-Vend design and tooling, but the industry's response to the machine led to Rod's and Bill's decision to manufacture and sell the machine themselves. After returning from the show, Rod discussed the response to his machine with Mr. Stoner, and invited Stoner to join with him in his plan to manufacture and sell the Lektro-Vend machine generally.

In December of 1962, immediately before the Vendo Board of Directors' meeting, Mr. Stoner told the Board Chairman that he, Stoner, would like a release from his employment contract, for the reason that he had an opportunity to invest in the Lektro-Vend machine and to participate with Rod Phillips in its manufacture and sale. He was requested to submit his request in writing for the Board to consider. Mr. Stoner made no mention of his previous financial aid toward the development of the Lektro-Vend machine. In short, Mr. Stoner was told that with his capital and experiences, he would be a formidable competitor, and that part of the consideration for the sales and employment contracts was that Vendo would not be competing with Mr. Stoner or his company.

While his release from his contract was denied, he was requested to act on behalf of Vendo in looking into the purchase of the Lektro-Vend machine from the Phillipses. Stoner discussed the matter with Rod Phillips, and then arranged a meeting in January, 1963, which was attended by Stoner, Rod Phillips and certain of Vendo's officers. The Lektro-Vend machine was demonstrated and explained at

that time, with Stoner taking no active part. Although price was not discussed at the meeting, Stoner later reported to Vendo that Rod Phillips was asking $1,500,000. Stoner testified that the Seeburg Corporation had shown an interest in purchasing the Lektro-Vend machine at that price.

Although Stoner recommended that Vendo purchase the machine, Vendo would not agree to pay such an amount. Instead, in March of 1963, in reply to an inquiry from Stoner, Vendo's Vice-President in charge of operations wrote that Vendo would only pay for out-of-pocket costs, "plus a fair profit to Rod and his associates; taking into consideration the amount of time, money and ingenuity which they had expended on the project, but that it was my feeling that this wouldn't add up to anything like $1,500,000."

Back in December, 1962, at about the time that Stoner was asking to be released from his employment contract with Vendo, his sister-in-law, Ruth Netrey, made a loan of $350,000 to Rod Phillips on his personal note bearing 4½% interest. Defendant's evidence is that Stoner in no way persuaded or influenced Mrs. Netrey to make this loan, which within one year was increased to $525,000. Mrs. Netrey had been one of the shareholders of Stoner Investments at the time of the sale of assets to Vendo, but had since sold her stock in that corporation, as did Mr. Stoner's mother, leaving only Mr. Stoner and his wife as shareholders of the defendant corporation.

In March or April of 1963, Stoner Investments had completed the construction of a general purpose office and manufacturing building on Sullivan Road in Aurora, where it had owned 370 acres of vacant land. The original purpose for constructing this building was allegedly to enable Stoner to prefabricate homes in the winter and to start the development of an industrial park. Its first and only occupants, however, were Rod and Bill Phillips who used the building for the manufacture of the Lektro-Vend machine. There was evidence tending to show that Stoner and the Phillipses

knew before the end of 1962 that the Sullivan Road Plant would be used by them for this purpose.

Admittedly, Mr. Stoner never advised Vendo until the Spring of 1963 as to his arrangements with Bill and Rod Phillips. He testified that while he made no attempt to conceal these arrangements, he did not regard them as being of consequence to Vendo.

The Lektro-Vend Corporation was organized on September 18, 1963, at which time its shareholders and the number of shares owned by each were as follows: Rod Phillips—2,875 shares; Glen Phillips—750 shares; Bill Phillips—1,125 shares; William Callahan (one of the former Stoner and Vendo employees who resigned from Vendo in August, 1961, and helped in the development of the Lektro-Vend machine)—250 shares; Ruth Netrey—5,000 shares.

On March 21, 1964, Stoner Investments contracted with Lektro-Vend Corporation to sell the Sullivan Road Plant to the latter. To finance the purchase, Lektro-Vend made a 100% short-term loan from a Chicago bank, which the bank would do only upon Stoner Investments' guarantee to repurchase the property in the event of a default. The loan had since been extended on several occasions, with Lektro-Vend paying the interest thereon.

Mr. Stoner's employment contract with Vendo terminated by lapse of time on June 1, 1964, and was not renewed although Stoner was retained on Vendo's Board of Directors until the Spring of 1965. In that same month, Mr. Stoner's wife was issued 5,000 shares of stock in Lektro-Vend Corporation, and in the following month Mr. Stoner himself was issued an additional 5,000 shares. On June 30, 1964, Stoner made a personal loan of $100,000 to Lektro-Vend, and this was repaid in 1965 from the proceeds of a $185,000 loan to Lektro-Vend from Stoner Investments. During 1965 and 1966, a total of $402,000 was loaned to Lektro-Vend from Stoner Investments and Stoner Shopping Center, Inc., all evidenced by demand notes bearing 4½% interest.

In March, 1965, Lektro-Vend salesmen reported that Vendo's salesmen were circulating rumors to the effect that Lektro-Vend was about to go out of business. When this was reported to Stoner, he wrote a letter on Lektro-Vend stationery to fifty vending machine operators. This letter, referred to throughout these proceedings as the "Dear Operator" letter, stated that Stoner was "now interested in the new Lektro-Vend Corp.," and "if Lektro-Vend can depend on your confidence . . . I guarantee that Lektro-Vend Corp. will be here for a very, very long time."

It appears from the evidence that Mr. Stoner has never been active in the day-to-day management of Lektro-Vend, and that he does not maintain a desk or office on the corporation's premises. The frequency with which he comes onto the premises varies—sometimes every day for a week, and sometimes not at all for a month. He is, however, consulted on financial and other matters.

Vendo filed its complaint herein on August 10, 1965, charging that Stoner and Stoner Investments breached their respective covenants against competition, which covenants are set forth above. An amendment to the complaint was filed on January 28, 1966, alleging that both defendants stole valuable trade secrets of Vendo, including the design for certain vending machines, which they appropriated for their own use and for the use of Lektro-Vend Corporation. The complaint, as amended, prayed for damages of $1,500,000 and for injunctive relief prohibiting defendants from engaging in the vending machine business. Neither Lektro-Vend nor either of the Phillipses was made a defendant.

At the conclusion of a bench trial, the court entered judgment against Stoner in the amount of $250,000, and against both Stoner and Stoner Investments in the amount of $1,100,000. In addition, both defendants were enjoined from engaging, directly or indirectly, in the business of manufacturing (and, in the case of Stoner Investments,

selling) vending machines until June 1, 1969 in the United States and in any foreign country in which Vendo was engaged in such business on June 1, 1959.

In support of this appeal, defendants urge the following grounds: (1) that Vendo did not possess a trade secret; (2) that in any event there was no appropriation of such a trade secret, assuming it existed; (3) that the covenants against competition are invalid; (4) that in any event the covenants were not violated; (5) that damages were improperly assessed; (6) that the injunctive relief granted was unwarranted because of an insufficient showing of irreparable damage, and because it was vague and beyond the prayer of the complaint; and (7) that the trial court erred in striking the affirmative defenses and counterclaim based on the plaintiff's alleged violation of the Federal and Illinois Antitrust laws.

The "Trade Secrets"

[1] We agree that plaintiff has not proven the appropriation of a trade secret, if indeed it has been shown that plaintiff even possessed a trade secret. Plaintiff had nothing more than a goal in mind—the goal of economically producing a FIFO machine with a see-the-bar-you-vend feature. However, plaintiff had not discovered a means of achieving this goal, and without this discovery plaintiff had nothing. There was no evidence offered to show that Vendo's goal or overall desire to produce such a machine was novel. Furthermore, the individual features which Vendo wanted to combine in a single machine were long and widely used in the industry.

If Vendo had discovered the *means* for achieving its goal, we might well have had a different view as to whether Vendo had a trade secret. But trade secrets evolve from the means—not the end. According to the American Law Institute Restatement, Torts, § 757, Comment b, a trade secret may consist "of any formula, pattern, device or compilation of information. . . ." Schulenberg v. Signatrol, Inc.,

33 Ill2d 379, 385, 212 NE 2d 865 (1965), cert den, 383 US 959, states:

> "The controlling definition of a trade secret in Illinois is supplied by Victor Chemical Works v. Iliff, 299 Ill 532, 540, 132 NE 806, where this court said that it is *a secret plan or process, tool, mechanism or compound* known only to its owner and those of his employees to whom it is necessary to confide it." (Emphasis added.)

We know of no authority for the proposition that an ultimate goal or purpose, as distinguished from the means of achieving it, can be classified as a trade secret. On the contrary, the authorities teach us that the trade secret must be in the plaintiff's "know-how," and Vendo simply did not "know how" to construct the particular machine it desired. This is evident from the record, where we see minutes of a Vendo meeting stating that the machine design "is *not acceptable* because of loading and inventory problems," and that the corporation "is to continue research as to how to basically improve the stock rotation idea *so that it can be made practical.*" (Emphasis added.)

[2] Apart from our conclusion that Vendo could not claim a trade secret in its models, the vast difference between these models and the Lektro-Vend machine, in terms of technology and design, is in itself sufficient to preclude recovery on the theory of the appropriation of a trade secret. The more essential differences are set forth above, and the success and acceptance of the Lektro-Vend machine, compared to the unacceptability of Vendo's speak for the materiality of these differences. And Vendo's theory of appropriation can hardly stand in the face of its previous attempts to purchase the Lektro-Vend machine and pay some amount of money for the "ingenuity which [the Phillipses had expended on the project." The fact that the Phillipses worked for approximately eigtheen months on the Lektro-Vend machine before their prototypes were ready is, in itself, evidence that they did not "steal" Vendo's methodics.

[3, 4] A final observation should be made on the question of whether defendants appropriated a trade secret. Before such a cause of action will lie, it must be shown that the secret was disclosed to or learned by the defendant while in a position of trust and confidence. Victor Chemical Works v. Iliff, 299 Ill 532, 548, 132 NE 806 (1921). In our opinion, the record before us falls far short of showing wherein the Vendo design was disclosed to or learned by Mr. Stoner. Sometime after the acquisition of the Stoner plant, Mr. Stoner was shown pictures of a manual FIFO candy machine which did not have a stock display window. Stoner replied that this machine was similar to an Orange Crush machine which his corporation had built in 1940. While Mr. Stoner was present at the products planning meeting on August 3, 1959, where the Vendo model was shown, he was at the meeting for no longer than a few minutes. One witness, who is no longer employed by any of the parties, testified that Mr. Stoner was at that meeting for somewhere between thirty seconds and three minutes. It further appears that Mr. Stoner's presence at the meeting was for other purposes, and that the meeting was in fact suspended during his brief appearance. In the words of a Vendo employee, it was then and there that the Vendo machine was "kind of" explained to Stoner.

[5] It cannot seriously be contended that these brief glimpses and glances could be the foundation for the development of a revolutionary design that would take several skilled people eighteen months to develop. The only other evidence of disclosure relates to the Phillipses, not to Stoner. Thus, Rod and Bill Phillips were shown artists' sketches of the machine at about the time of the acquisition, or about one year prior to the Phillipses resignations from Vendo, and fully 1½ years before Rod began work on what was to become the Lektro-Vend machine. While Rod was at the products planning meeting on August 3, 1959, he was there only to help answer the question of whether such a machine could be produced at the Stoner plant. Neither the Phillipses nor the Lektro-Vend Corporation was made

party to this suit. Although that, standing alone, would be no defense to Stoner, for one may not employ others to appropriate trade secrets which he himself might not appropriate (e.g., Colgate-Palmolive Co. v. Carter Products, Inc., 230 F2d 855, 864 (4th Cir 1956), cert den, 352 US 843 (1956), reh den, 352 US 913 (1956), we simply fail to see where sufficient information was disclosed to or learned by the Phillipses to enable them to design and develop the Lektro-Vend machine. The evidence does not indicate that they were shown measurements, tolerances, materials, and the like, nor is there evidence that they made or were given pictures or drawings of what they were briefly shown.

The Covenants Not To Compete

Defendants next contend that the covenants against competition by Stoner and Stoner Investments are invalid and unenforceable as constituting unreasonable restraints of trade, and that these covenants, even if valid, were not breached by defendants.

[6, 7] The general rule is that a covenant against competition, ancillary to the sale of a business or an employment contract, will be upheld if the restraint on trade is reasonable in terms of time and territory, with the question of reasonableness depending on the circumstances of each case. E.g., Storer v. Brock, 351 Ill 643, 184 NE 868 (1933); Parish v. Schwartz, 344 Ill 563, 176 NE 757 (1931); Lanyon v. Garden City Sand Co., 223 Ill 616, 79 NE 313 (1906); Andrews v. Kingsbury, 212 Ill 97, 72 NE 11 (1904); Union Strawboard Co. v. Bonfield, 193 Ill 420, 61 NE 1038 (1901); Lanzit v. J. W. Sefton Mfg. Co., 184 Ill 326, 56 NE 393 (1900); Hursen v. Gavin, 162 Ill 377, 44 NE 735 (1896). This general rule has been interpreted in Illinois by a line of cases beginning with Parish v. Schwartz (supra), to mean that any such restraint covering the *entire* State of Illinois is, on its face, unreasonable and therefore void. The rationale of this rule is that no person should be required to leave the state in order to pursue his regular occupation,

nor should the people of the state be totally deprived of his labors. It is on this proposition which defendants rely.

However, in spite of the widespread acceptance of this general rule, the courts of this and other jurisdictions have come to recognize an exception, which we believe applicable here, where the restraint lasts during the contractual relationship of the parties. Stated differently, the territory covered by a covenant against competition, otherwise unreasonably broad, will not invalidate the covenant to the extent that it exists during the terms of the employment, lease, franchise agreement, etc.

The earliest case known to us which recognizes this exception to the general rule is Harrison v. Glucose Sugar Refining Co., 116 F 304 (7th Cir 1902). There the defendant had agreed that *during the term of his employment* he would not work for any glucose manufacturer other than the plaintiff within a 1,500 mile radius of Chicago, an area encompassing practically the entire United States. The court held the covenant valid and enjoined its violation. In distinguishing this *in-term* covenant case from those involving *post-term* covenants—i.e., covenants not to compete *after* employment or *after* the sale of a business—the court said (at p 310):

> "Here the restriction is limited to the period of service engaged for. The appellant left without cause and to enter the service of a rival. There was no aquiescence by appellee . . . . Clearly, under such circumstances no public policy would be violated in upholding the covenant. He is not deprived of the opportunity to obtain the means of subsistence or of giving to the public the benefit of his skill in the business to which he has been accustomed. He has only to perform the duty which he engaged to perform to render himself and his family comfortable. We know of no public policy which requires us to sanction the bald violation of a contract lest the public should be deprived of the peculiar skill

of the appellant because he will not exercise that skill where he has engaged to exercise it."

The distinction between in-term and post-term covenants was similarly recognized in Saul v. Thalis, 156 F Supp 408, 411 (DCDC 1957), where the court stated:

> ". . . this case involves an agreement of employment for a fixed term containing a covenant which restricts the employee from engaging in a competing business during the term of employment fixed by the agreement. The validity of such covenant cannot be questioned so long as the employee remains in the employ of the employer."

In Good v. Modern Globe, Inc., 346 Mich 602 78 NW2d 199 (1956), an employment contract provided that the employee, "for the above specified period [the term of employment] . . . will not, without prior written consent of the company, become employed, directly or indirectly, by any manufacturer of knitted goods or products presently manufactured by the company . . . ." The Michigan Supreme Court sustained the validity of this covenant, even though Michigan had a sweeping statute invalidating all contracts not to engage in business.* The court stated (at p 204):

> "The plain language of this contract indicates that it is a contract of employment, not a contract whereby Good undertook not to engage in employment. A provision therein which forbade Good to become employed by any knitted goods manufacturer of products competitive to Globe's, is a provision which any employer

* Mich. Stats. Ann. § 28.61 (1948): "All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, *whether reasonable or unreasonable,* partial or general, limited, or unlimited, are hereby declared to be against public policy and illegal and void." (Emphasis added.)

> would certainly have a right to contract for from any employee *for the duration of his employment.* The contract is not void under CL 1948, § 445.761, Stat Ann 28.61." (Emphasis supplied.)

In 1963, this court was squarely faced with the question of whether to follow or reject the "in-term—post-term" distinction, and we chose to follow it. McDonald's Systems, Inc. v. Sandy's Inc., 45 Ill App2d 57, 195 NE2d 22 (1963). In McDonald's, the individual defendants had been granted a ten-year franchise by the plaintiff to operate a single drive-in restaurant in Urbana, Illinois. Paragraph 8 of the franchise agreement provided essentially as follows:

> *"During the effective term of this agreement,* Second Party [defendants] shall not, except with the consent of First Party [plaintiff], engage in any business the same as or similar to the business covered by this agreement at any place other than the premises heretofore described in the State in which said premises are located or at any place in a state contiguous to said State . . . ." (Emphasis added.)

Notwithstanding this covenant, the defendants, during the term of the franchise, organized a corporation to own and operate a similar drive-in restaurant in Peoria. In a suit brought by the plaintiff to enjoin the continued violation of the covenant and for damages, the trial court held that the restraint was unreasonably broad and that the covenant was therefore void. The opinion of this court reviewed the authorities discussed above (Harrison v. Glucose Sugar Refining Co. (supra); Saul v. Thalis (supra), and Good v. Modern Globe, Inc. (supra, at p 75)) and reversed the trial court, stating:

> "Under these and other authorities *the extent of the territorial restriction is a factor which affects the validity of a post-term covenant only.* In the instant case the covenant is an in-term, not a post-term, cove-

nant, and as *long as appellees seek to avail themselves of the beneficial provisions of their franchise contract, they should not be permitted to disregard or refuse to abide by the several obligations they assumed.* The contract was not of unlimited duration, and when the franchise term is ended, either by cancellations, or by the expiration of time, appellees are free to engage in similar business elsewhere without any franchise. There is nothing illegal in such an agreement, and the obligations of the respective parties should be respected and enforced." (Emphasis added.)

Other Illinois decisions have recognized the distinction between in-term and post-term covenants not to compete. In Ellis Electrical Laboratory Sales Corp. v. Ellis, 269 Ill App 417 (1933), the court upheld the agreement of a supplier of goods not to sell such goods to others during the term of the agreement. In Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill 616, 79 NE 313 (1906), the Illinois Supreme Court upheld a lessor's covenant not to compete with his lessee during the term of the lease, notwithstanding that the restriction was statewide. In Match Corp. of America v. Acme Match Corp., 285 Ill App 197, 1 NE2d 867 (1936), the court enforced the defendant's promise that it would not, during the term of the contract, sell book matches in competition with the plaintiff, with no area limitation.

[8] Under the precedent thus established, we are constrained to hold that the covenant before us is valid and enforceable. The covenant of Mr. Stoner was unquestionably in-term during the first five years, since that was the duration of his employment contract with Vendo. It was within that period of time that he violated his covenant. During the post-employment period, or the additional five years, Stoner's activities were simply an affirmation of his prior violation—a retention of the fruits of his breach—and upholding his post-employment activities would be tantamount to our sanctioning his earlier breach. That the

post-term aspects of the covenant might, if standing alone, be unnecessarily broad, is therefore irrelevant to the disposition of this appeal. In any event, Stoner Investments, the corporation through which Stoner chose to exercise his breach, was his alter ego, and Stoner Investments entered into a covenant of its own which we characterize as in-term. The sale of assets to Vendo contemplated a ten-year relationship with Stoner Investments as well as with Mr. Stoner. The contract required Vendo to pay Stoner Investments, for a period of ten years from January, 1959, all profits in excess of $250,000 earned by Vendo from the assets sold. In addition, Stoner Investments was to be paid during this same ten-year period 25% of all monies Vendo was to receive from foreign production of products then under development by Stoner Investments. As we said in McDonald's (supra at p 75), during that period of time which defendants "seek to avail themselves of the beneficial provisions of their . . . contract, they should not be permitted to disregard or refuse to abide by the several obligations they assumed." Surely under these facts, and in view of the complete ownership of Stoner Investments by Stoner and his wife, and Stoner's complete dominion of the corporation, we must consider the covenants of each to be coextensive to be meaningful. In short, the sale of assets to Vendo represented a transaction which the parties contemplated would take ten years to consummate. The ten year restraints are therefore "in-term" under the teaching of McDonald's and other cases, and are valid and enforceable.

Defendants argue that the noncompetition clauses were not in fact violated by their conduct. They reason that the conduct complained of consisted only of paying salaries, making loans, furnishing sites and facilities, and holding stock, and that such activities, since not specifically prohibited, are authorized. Indeed, cases are cited for the proposition that the lending of money to plaintiff's competitor does not violate the lender's covenant not to compete (Battershell v. Bauer, 91 Ill App 181, 182 (1900);

Sineath v. Katzis, 218 NC 740, 12 SE2d 671, 681 (1941), Gallup Elec. Light Co. v. Pacific Improvement Co., 16 NM 86, 113 P 848, 850 (1911)), that the granting of a lease to a competitor is likewise not tantamount to engaging in competition (Wineter v. Kite (Mo App), 397 SW2d 752, 759 (1965); Ericson v. Jayette, 149 Fla 82, 5 So2d 453, 454 (1942), and that both lending *and* leasing is not a violation of such a covenant (McKeighan Wachter Co. v. Swanson, 138 Wash 682, 245 P 10, 11 (1926)), affd 141 Wash 694, 250 P 353.

[9] Defendants, however, have done considerably more than merely make loans and leases to a competitor. They literally paid the salaries of the competitor and its employees, they furnished a building rent-free and guaranteed the loan by which the competitor could purchase another building from them, they took a sizeable amount of stock in the competing venture within days of the time they thought they could legally do so, and they made several large loans at no or low interest. Clearly, these activities show that defendants were closer than arm's length to the development of the Lektro-Vend machine. To suggest otherwise attributes a great deal of naiveté to this court. Even the cases cited by defendants are expressly limited to those situations where the defendant lender or defendant-lessor does not encourage and has no interest in the business of the competitor. E. g., Gallup Elec. Light Co. v. Pacific Improvement Co. (supra at p 851); Sineath v. Katzis (supra); McKeighan Wachter Co. v. Swanson (supra); Wineteer v. Kite (supra).

We sustain the trial court's finding that defendants' activities amounted to the direct or indirect entering into or engaging in the vending machine business.

The Assessment of Damages

As noted above, the trial court entered judgment against Stoner and Stoner Investments for $1,100,000, and against Stoner alone for $250,000. The larger judgment was based

upon evidence tending to show that the value of the Lektro-Vend machine was approximately $1,500,000 that Stoner himself believed this to be what the machine was fairly worth and that the approximate cost necessary to develop such a machine would be $400,000. The machine thus represented a potential profit to its developers, as it then stood, of $1,100,000. The $250,000 judgment represented a return of the entire salary Stoner received during his five years of employment by Vendo.

Although the judgment order did not specifically apply these judgments between the two theories of recovery set forth in Vendo's complaint, as amended, the briefs and arguments of the parties in this court have treated the $1,100,000 judgment as arising out of the trade secret theory, and the $250,000 as applicable to the breach of the covenants not to compete. We agree that this appears to have been the reasoning of the trial court.

Our conclusion that Vendo has not proven a theft or appropriation of a trade secret precludes any recovery on that theory. We are thus limited to ascertaining the proper measure of damages for the breach of the covenants not to compete.

[10] At the outset, we agree that such a breach of Stoner's fiduciary undertaking as an employee in the instant case requires a forfeiture of salary during the period that the breach was occurring. Ely v. King-Richardson Co., 265 Ill 148, 153, 106 NE 619 (1914); National Lock Co. v. Aldeen, 271 Ill App 37, 40 (1933); Evangelista v. Queens Structure Corp., 27 Misc2d 962, 212 NYS2d 781 (1961); Harry R. Defler Corp. v. Kleeman, 19 App Div2d 396, 243 NYS2d 930, 938 (1963). In fact, none of the parties seriously question this general rule, their main dispute being to define the period of the breach. Plaintiff contends that the breach began immediately after the signing of the sales and employment agreements, but before the take-over, when Stoner spoke to the business representative of the union representing the plant employees for the alleged purpose of

frustrating the sale. Plaintiff thus urges that all of Stoner's salary during his five-year employment, or $250,000, should be recoverable. Defendants, on the other hand, contend that even if a breach existed, it cannot be traced prior to about January, 1961, the time when defendants began making loans to Rod Phillips. It is our opinion that defendants' view is the more reasonable in this respect.

Nothing came of Stoner's brief conversations with the union representative, even construing them in their worst light, and we attach no legal significance to them. We have more trouble justifying the events of mid-1960, when Bill Phillips began receiving financial aid from defendants to develop his electronic coin detecting device. Even here, however, we cannot conclude that Stoner's activtites were a part of his overall breach. A coin detecting device has so many uses outside the vending machine industry (slot machines, coin counters for busses and telephone companies, toll road collectors, parking meters, etc.), that its development is not necessarily a step toward "engaging" in such industry. In any event, this detector was never built or put to use, and its development, as far as the record discloses, did not contribute materially to the evolution of the Lektro-Vend machine. Defendants' breach, therefore, originated at the end of 1960 or in the beginning of 1961, when the extensive loans to Rod Phillips started, when defendants began paying salaries to Rod Phillips' employees, when the Middle Avenue Building was made available for the Phillips' use, and, in short, when the first breaths were blown into the Lektro-Vend machine.

When did the breach end? Defendants say the breach, assuming it existed at all, ended in December, 1962. But defendants would have us overlook the fact that in 1963 they gave the Phillipses the use of the Sullivan Road Plant, and in 1964 they in effect guaranteed the loan which enabled the Phillipses to purchase this plant. This transaction was completed within a few weeks of the end of Stoner's employment contract.

In view of the foregoing, we are of the opinion that the defendants' breach lasted throughout 1961, 1962, 1963, and through May, 1964, a total of approximately three years and five months. Inasmuch as this cause will be remanded for reasons stated below, the trial court will be in a position to make a more precise determination as to the period of the breach and salary forfeiture, having this opinion in mind.

[11, 12] In addition to the recovery of the salary paid Stoner during the breach, Vendo would be entitled to recover any damages to its business occasioned thereby. This would be the measure of lost profits to Vendo during the period of the breach, plus the diminution of its business at the end of the period covered by the covenants. Mirkovich v. Maravich, 206 Ill App 463 (1917) (Abst). Other Illinois decisions holding that the measure of damages in such a case is the provable loss to the covenantee, and not the gain accruing to the covenantor by reason of his breach, include Henry's Drive-In, Inc. v. Anderson, 37 Ill App2d 113, 125, 185 NE2d 103 (1962); Stewart v. Challacombe & Ramsey, 11 Ill App 379, 383 (1882); Bauwens v. Goethals, 187 Ill App 563, 567, 568 (1914). See also the annotation in 127 ALR 1152 (1940), where cases from all jurisdictions are cited in support of this general rule.

Conceding the difficulty of ascertaining such damages, we repeat what was said in Stewart v. Challacombe & Ramsey (supra, at p 382):

> "This difficulty [of ascertaining damages] has long been recognized, and it is for this reason that courts of equity interfere by injunction to restrain parties from entering into trade in violation of such contracts, and for the same reason it has become usual to insert in such agreements a sum certain to be paid in case of violation, as liquidated damages. Such considerations, however, cannot authorize a change of the fundamental rules of law. As was said in Terry v. Eslora, 1 Porter, 273, such difficulties 'are intrinsic in the subject about

which the parties have chosen thus loosely to contract.' "

The foregoing language was cited favorably in Bauwens v. Goethals (supra. at p. 569), where the court added:

> "A party may not sell a prospect for a valuable consideration received and on breach of his contract defend on the ground that the subject-matter is of too uncertain value to permit its measurement in a court of law."

Applying these precedents to the case before us, we see that the value of the Lektro-Vend machine, which the trial court found to be $1,100,000 after deducting estimated development costs, is neither an element nor a yardstick of damages for a breach of the noncompetition convenants. While this figure may represent the gain to Stoner and his associates, it does not necessarily reflect the damage to the plaintiff. We hold instead that Vendo should be permitted to recover an amount equal to the net profits it lost and might reasonably be expected to lose, plus the amount by which the value of its business will have been diminished as of June 1, 1969, because of defendants' wrongful competition.

[13] On remand, the trial court should determine the extent of these damages. To the extent that the record is wanting of proof on this issue, the court below will entertain further evidence of such damages. A similar situation developed in the appeal of Henry's Drive-In, Inc. v. Anderson (supra, at p. 128), where it was said:

> "Where a material question is in controversy upon a material issue and the record discloses that all the evidence on that issue has not been produced, this court has the power to reverse the judgment and remand the cause for the taking of further evidence, on the part of either or both of the parties, upon the issues. [Citing cases.] In this case the judgment must be reversed and the cause remanded to the trial court in order that loss of net profits may be proved.'

[14] Defendants argue that no damages whatsoever can be assessed against Mr. Stoner, even if he were found to have breached a valid noncompetition covenant, because the employment contract provided that Vendo "shall have the right to terminate this agreement upon thirty (30) days' notice in the event of the substantial violation of the terms hereof by Stoner." Thus, defendants maintain that this provision constitutes an implied waiver by Vendo of its right to damages in the event of a breach, and that Vendo in effect agreed that its only remedy for a substantial breach would be termination of the employment contract. We cannot accept this argument. We see nothing in the contract to suggest that Vendo intended to waive its remedial rights by expressing its right to terminate an employment contract breached by its employee, a right that it would have even without such a provision. Suppose Stoner had literally stolen a large amount of cash from Vendo; would defendants argue that Vendo's only remedy would be to discharge Stoner, and that it would have no right to recover the stolen cash?

The Injunctive Relief

The injuctions granted below restrained Stoner and Stoner Investments "from engaging, directly or indirectly" in the vending machine business until June 1, 1969, in the United States or any foreign country in which Vendo engaged in such business as of the date of the acquisition of the Stoner plant.

[15] In opposition to this injunctive relief, defendants first argue that there were no allegations or proof as to Vendo's irreparable damage. As respects defendant Stoner, however, we believe a sufficient allegation of irreparable damage is made in paragraph 9 of the complaint, which provides:

> "9. That unless restrained by an Injunction of this Court, the defendant, Harry B. Stoner, will continue at his engagement in the foresaid enterprises and cause

> continuing irreparable damages to the plaintiff, The Vendo Company, and will cause the plaintiff irreparable damages in the future."

The complaint also prays for injunctive relief against defendant Stoner.

[16] On the other hand, Count II of the complaint, directed against Stoner Investments, is totally silent both as to an allegation of irreparable damage and as to a prayer for injunctive relief. As long as decisions of this court have been reported, it has been held that "a party . . . seeking relief by way of injunction, must specifically pray for such relief, otherwise the court will not aid him." Willett v. Woodhams, 1 Ill App 411, 413 (1877). Inasmuch as plaintiff has made no motion to amend either the allegations or the prayer of its complaint in these respects, the court erred in ordering an injunction against the corporate defendant.

[17, 18] As against the individual defendant, Mr. Stoner, we conclude that the injunctive relief was justified. The evidence showing that Lektro-Vend machine's impact on the vending machine industry, coupled with the proof of Stoner's influence in the development of that machine, is ample to warrant the finding, implicit in the issuance of the injunction, that Vendo suffers actual or threatened irreparable injury from Stoner's wrongful activities. Further, we are of the opinion that the scope of the injunction granted is reasonable in light of the evidence adduced at the trial, and is consistent with the allegations and prayer of the complaint. The restraint imposed by the injunction is no more broad than the restraint imposed by Stoner's employment contract, and since we have already concluded that the latter is reasonable in view of the facts before us, we must conclude that the injunction is equally reasonable.

In any event, the injunction is not now in force by reason of the failure to file a bond, and by its terms is to terminate on June 1, 1969. In these circumstances, further comment on this aspect of the appeal is at best gratuitous.

The Antitrust Defenses and Counterclaim

By way of affirmative defense, it was alleged that the contracts sued upon violated the Illinois and Federal Antitrust laws and were therefore invalid and unenforceable. Defendants also counterclaimed under the Illinois Antitrust laws for treble damages. The trial court, reasoning that a state court has no jurisdiction to hear a federal antitrust defense, struck the defense founded on the federal statutes. The defense and counterclaim based on the Illinois Antitrust law of 1891, which was in force at the time of the contract between the parties, was stricken on the theory that the statute related only to agreements to fix prices and production, neither of which was alleged in these proceedings, and also because the commerce involved was interstate rather than intrastate. The 1965 Illinois Antitrust law was held inapplicable for the additional reason that it had not been enacted until after execution of the agreements sued upon.

In our review of the striking of these pleadings, we shall consider first the defense asserting the federal laws, and thereafter the defense and counterclaim based on the Illinois statutes.

The Federal Antitrust Defense

[19] It was held below that the Illinois courts are without jurisdiction to consider a defense created by the federal antitrust statutes. We are aware of no Illinois precedent which would support this holding. On the contrary, it appears that the Illinois courts have on more than one occasion passed upon the merits of a defense based on the federal antitrust laws.

In Corn Products Refining Co. v. Oriental Candy Co., 168 Ill App 58 (1912), a contract provided that the plaintiff would, on December 31, deliver a price rebate to the defendant if the latter purchased all of its annual requirements of unmixed corn syrup from the plaintiff. On December

24, the defendant unilaterally deducted the amount of such rebate from a payment due plaintiff. The plaintiff brought suit for the amount of the deduction, alleging that the defendant had purchased certain of its syrup requirements from others, and that in any event the rebate was not earned until December 31. As a defense, defendant alleged that the plaintiff was a monopoly in restraint of trade in violation of federal and Illinois law. Although affirming a decision in favor of the plaintiff, the court observed at page 589:

> ". . . if it be a fact that defendant in error was and is an unlawful combination and had violated the Federal Anti-Trust Laws, as charged by plaintiff in error, such fact would not defeat the defendant in error in its suit for the recovery of the purchase price of property sold by it under a contract collateral to such wrong committed by it. In order for such a defense to prevail, the contract sought to be enforced must have been made to further the objects of the illegal combination. This was the rule under the common law, and it is also the rule under The Federal Anti-Trust Law, as declared by the Federal Courts, and by those decisions the courts of this state are bound."

The holding of the Corn Products case is that where the contractual provision sued upon is itself a violation of the federal statutes, the Illinois courts will entertain such a defense, but that the antitrust defense does not afford a defense where it is collateral to the provision sued upon. In any event, the mere fact that the defense is predicated on the federal statutes does not in itself deprive the state court of jurisdiction to hear and pass upon it.

Merchants Service Corp. v. Libby, McNeill & Libby, 314 Ill App 121, 40 NE2d 835 (1942), is another case supporting our view that the court below erred in striking the federal antitrust defense on the pleadings. There, in a suit for unpaid brokerage commissions, the defense asserted that

the payment of the commissions would violate the Robinson-Patman Act, the federal law prohibiting certain pricing discriminations. While the contract between the parties predated the federal act, the sales giving rise to the disputed commissions were made after the legislation. The court stated that the principal question was the applicability of the statute where the sales contracts were initiated before the sales completed after the effective date of the act. After holding that Congress intended to cover such transactions, and that this would not violate the Constitutional prohibition against the impairment of contracts, the court reversed the trial court and entered judgment in favor of the defendant, saying at page 129:

> ". . . defendant could not pay and plaintiff could not receive or accept the commissions or price discounts for which this action is brought without violating the plain provisions of the Robinson-Patman Act."

See also, Cummings-Landau Laundry Mach. Co. v. Koplin, 316 Ill App 306, 44 NE2d 613 (1942) (Abst), affd in part and revd in part on other grounds, 386 Ill 368, 54 NE2d 462 (1944).

On the strength of the foregoing Illinois authorities, in opposition to which the plaintiff has not cited a single Illinois case, we hold that the trial court erred in striking the federal antitrust defense without a hearing. Plaintiff's reliance on Bruce's Juices, Inc. v. American Can Co., 330 US 743 (1947), is misplaced, since that decision in no way considered a state court's jurisdiction to hear and adjudicate a federal antitrust defense to a contract action. Instead, that case dealt only with the specific remedies afforded by the Robinson-Patman Act, and in no way distinguished between the jurisdiction of the federal and state courts.

The Illinois Antitrust Defenses and Counterclaim

[20] The principal question here is not whether the Illinois Antitrust laws have been violated, but instead

whether the interstate nature of the parties' businesses renders these state laws inapplicable under the doctrine of federal preemption. If the question be resolved in the negative, it would be necessary to consider the merits of the defenses and counterclaim based thereon.

We believe that Kosuga v. Kelly, 27 F2d 48 (7th Cir 1958), affd 358 US 516 (1959), rehearing den, 359 US 962, is dispositive of this question in favor of plaintiff. In Kosuga, the plaintiff brought suit for the purchase price of onions sold by it to the defendant. The allegation that the contract violated the Illinois Anti-trust laws was pleaded as an affirmative defense. The District Court struck this as well as other defenses, and entered judgment in favor of the plaintiff. In affirming the striking of this defense, the Court of Appeals announced at page 55:

> *"The Illinois Act as the substantive law of the State is applicable only to intrastate commerce.* Defendant apparently so recognizes and argues that such commerce was involved inasmuch as the contract of sale was made and was to be performed in the State of Illinois. Defendant makes this argument in spite of the apparently so recognizes and argues that such comfrequent allegations in his pleadings that 'said onions which were the subject of said agreement and contract were a part of interstate commerce.' In 15 CJS Commerce § 133(b), it is stated that 'state anti-trust laws do not apply to transactions involving interstate commerce . . . .' *It is hardly open to doubt but that the transaction in issue involved interstate commerce. It is, therefore, our view that the Illinois Act is without application.*" (Emphasis added.)

Nowhere have defendants pleaded or argued that the commerce involved here is anything but interstate. Indeed, the business covered by the contracts before us is not only interstate, it is international. It follows, under the doctrine announced in Kosuga, that the trial court properly struck

the affirmative defenses and counterclaim founded on alleged violations of the Illinois Anti-trust laws.

It should be noted that defendants attempted without success to distinguish Kosuga by arguing in their brief that "the only reason the Seventh Circuit held the Illinois Anti-Trust Act inapplicable was because it *was not* pleaded as a defense to the action." (Emphasis in original.) Not so. The opinion of that court specifically states in at least two passages that the defendant's reliance on the Illinois Anti-trust laws was before the court by way of "affirmative defense." (See pages 50, 55.) We read nothing in the opinion to suggest that this defense was not pleaded, contrary to defendants' assertion without citation.

Our conclusion that the Illinois Antitrust laws are inapplicable renders unnecessary any discussion as to the interpretation of these laws and the remedies which they provide either by way of counterclaim or affirmative defense.

For the above reasons, the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with the views expressed herein.

Affirmed in part, reversed in part, and remanded.

MORAN, P. J. and ABRAHAMSON, J., concur.

Transcript Of Proceedings In
Vendo Co. v. Stoner (state court suit)

[Trial hearings (second trial) before Judge John S. Petersen began April 9, 1971.]

[CAPTION OMITTED IN PRINTING]

[3003] (Pursuant to notice previously served on plaintiff's attorneys, Mr. Sheridan moved to dismiss without prejudice defendants' sixth affirmative defense as amended, that is, the federal anti-trust defense. There being no objection, the Court entered its order that the motion be granted.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, HARRY B. STONER, and STONER INVESTMENTS, INC., a Delaware corporation, **Plaintiffs,** **v.** **THE VENDO COMPANY, a Missouri corporation,** **Defendant.**	**No. 65 C 1755**

MEMORANDUM OPINION AND ORDER

(Filed June 1, 1971)

On August 10, 1965, suit was instituted in the state court by the Vendo Company, charging Harry B. Stoner and the Stoner Investments Company with breach of contract. The specific grievance concerns two non-competition for ten year clauses, which formed the part of a sale of business between these parties. The complaint alleged a breach in that Stoner and the Stoner Investments Company had given financial aid and advice to the Lektro-Vend Corporation. Lektro-Vend and Vendo sell vending machines. As part of their answer, Stoner and Stoner Investments asserted a federal anti-trust defense. 15 U.S.C. Sections 1 and 2.

On October 21, 1965, Stoner and Stoner Investments, plus Lektro-Vend, instituted a federal anti-trust suit in this court. The facts and issues are substantially identical with the state court proceeding.

Circuit Court Judge Peterson struck the federal anti-trust defense on the grounds that he had no jurisdiction over the defense. This decision was reversed by the Appellate Court. *The Vendo Co.* v. *Stoner,* 105 Ill. App.2d 261,

296-7 (1969). The case was reversed and remanded to the trial court for a determination of the contract cause of action in light of the federal anti-trust defense. The case now presents a conflict in the comity between our bipartite judicial system. A single issue is now before two courts for resolution, the only ostensible difference being that damages are sought in this court on the anti-trust claim, while the anti-trust allegation in the state court is raised as a defense.

I

The plaintiffs have moved for summary judgment based on the theory that the two non-competition clauses, since they apply wherever Vendo does business, are unreasonable and thus a per se violation of the Sherman Act. 15 U.S.C. Section 1. However, even if they are unreasonable, this may not be a per se violation of the Sherman Act. *Snap-On Tools Corp.* v. *F.T.C.*, 321 F.2d 825, 837 (7th Cir. 1963). In this case, we have the further problem that plaintiffs want the court to presume the required motive and intent from the scant evidence it presents. But summary procedures should not be used to dispose of a complicated anti-trust case, especially where motive and intent play a leading role. *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Granader* v. *Public Bank*, 417 F.2d 75, 83 (6th Cir. 1969). The court is of the opinion that there are still triable issues concerning the alleged violation of 15 U.S.C. Section 1, and summary judgment is not appropriate.

II

Defendant has moved for summary judgment based on three theories.

The first theory is that the Illinois Appellate Court decided that the clauses in question were not in restraint of trade. *The Vendo Co.* v. *Stoner, supra.* The defendant, therefore, asserts that the plaintiffs are barred by the doctrine of collateral estoppel. But as is clear from the opinion,

the Illinois court never reached the merits of the federal anti-trust issue. Rather than that, the court remanded the issue to the trial court. *Vendo, supra,* pp. 297, 299. Therefore, the doctrine of collateral estoppel does not apply.

The second ground asserted is that the president of Lektro-Vend, Mr. Phillip, stated that his company is not in competition with the defendant. While this is seemingly a damaging admission, this court cannot hold that it is conclusive. This issue will be better resolved by a trial on the merits.

Finally, the defendant attacks the standing of the plaintiffs to bring this suit. The defendant alleges that there is no proof of any damages since Lektro-Vend received financial aid and advice from Stoner. This defense goes to the merits and is an inappropriate basis for summary judgment.

Therefore, the plaintiffs' motion and the defendant's motion for summary judgment are hereby denied.

III

Counsel for the plaintiffs have recently brought to our attention the fact that they have withdrawn their federal anti-trust defense in the state court. This was undoubtedly done in consideration of this court's expressed reluctance to consider the cause of action here while the same issue was pending between the same parties in the state court case. But this withdrawal of the issue does not completely eliminate the problem of res judicata. A time honored United States Supreme Court opinion by Justice Field stated:

> In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter *which was offered and received to sustain or defeat the claim or*

> *demand, but as to any other admissible matter which might have been offered for that purpose....* Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. *Cromwell* v. *County of Sac,* 94 U.S. 351, 352-53 (1876). (Emphasis added)

See also *Granader* v. *Public Bank, supra.*

This court views the theory of res judicata as an attempt "to require a plaintiff to try his whole cause of action and his whole case at one time." *Baltimore S.S. Co.* v. *Phillips,* 274 U.S. 316, 320 (1927). This duty is equally encumbent upon the defendant, for he should not split up his alleged claim and assert part of it as an affirmative defense and another part of it for affirmative relief. Clearly, Vendo could not do this as plaintiff in the state court, so neither should the defendants. *Phillips, supra.*

The court views the facts of this case as a bipartite litigation of one cause of action. The one element which separates this from the normal situation is that plaintiffs are defendants in the state court. What we have here is a single contract which the plaintiffs Stoner and Stoner Investments claim violates their legal rights. Thus, they claim, the contract should be declared null and void, or if enforced, then damages are due them. This is one cause of action because "a cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Phillips, supra,* at 321. See also *Hurn* v. *Oursler,* 289 U.S. 238 (1933). Therefore, under the present fact situation, Stone and Stoner Investments had an alleged right to not only seek to defend against the contract, but also to seek recompense for any actual damages sustained, through the state court proceeding.

Rather than decide this issue *sua sponte,* the court directs the parties to brief the issue of whether plaintiff is now precluded from asserting his federal anti-trust claim in the

federal court by the doctrine of res judicata. Therefore, defendant The Vendo Company is given fifteen (15) days from the date of this order to submit a brief on this issue, plaintiffs Harry B. Stoner and Stoner Investments fifteen (15) days to answer, and defendant ten (10) days to reply.

ENTER:

/s/ FRANK J. McGARR
United States District Judge

DATED: June 1, 1971

MINUTE ORDER

(Entered June 1, 1971)

[CAPTION OMITTED IN PRINTING]

Pursuant to memorandum opinion and order entered this day, the motions of plaintiffs and defendant for summary judgment are hereby denied. The parties are ordered to brief the issue of whether plaintiff is now precluded from asserting his federal anti-trust claim in the federal court by the doctrine of res judicata on the briefing schedule set out in the memorandum opinion. —DRAFT

/s/ McGarr, J.

Second Judgment In Vendo Co. v. Stoner (state court suit)

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

THE VENDO COMPANY, a foreign corporation,	**Plaintiff**	**No. 65-2134**
v.		
HARRY B. STONER and STONER INVESTMENTS, INC., a foreign corporation,	**Defendants**	

JUDGMENT

(Filed August 13, 1971)

This cause coming on to be heard on the remand from the Appellate Court of the Second District, in accordance with the Mandate of that Court filed herein and being guided by the Opinion of the Appellate Court (*The Vendo Co.* v. *Stoner,* et al., 105 Ill. App. 2d 261), which Opinion and Mandate are the law of this case, and referring particularly to the language of the Appellate Court as found on pages 290 and 291 of said opinion, this trial court will not go into detail as to all of the cases cited by Counsel on both sides in the respective motions and briefs and oral arguments.

But this trial court, constantly laboring in the vineyard of litigation and being fully aware of our adversary proceedings with all Counsels' desire to win for their respective clients, is fully aware that none of the spoken words of the witnesses in print will ever portray the feelings, animosity, and almost venom that the Court's attaches and the trial judge witnessed, the hostility that prevails in many cases; and in this case even to observe one defense witness; namely, John Brothers, who had documented his testimony and was reading from his notes, could but give one firm impression to this trial judge, that notwithstanding the trial court's original hearing of the testimony and findings,

the Appellate Court's affirmation of liability, the refusal of the Supreme Court to accept the appeal leaves the trial court with one definite conclusion: That notwithstanding the aforesaid is the defendants' desire to relitigate the question of liability. The only saving feature for the trial judge is the factor that Counsel for the defendants, as well as Counsel for the plaintiff, being officers of this Court, did exercise the expertise of competent Counsel, even though the defendant and defendant's witnesses wanted to relitigate liability previously fixed.

Counsel for the defendant and defendants, as officers of the Court, waited until the last moment before this remand hearing commenced, although the case had been set at numerous times at Defense Counsels' convenience, to finally announce to the trial court that the defendants were withdrawing their Sixth Affirmative Defense, which point is forcibly brought out on page 38 of the oral argument, wherein Defense Counsel and the trial court discuss the Sixth Affirmative Defense. And it would appear that Defense Counsel agrees with the trial court on that particular defense, thereby leaving the question of liability and damages on three points, again referred to on pages 290 and 291 of the aforesaid Appellate Court Opinion.

And this Court, as it appeared in one of the cases cited by Plaintiff, quoting Defense Counsel referred to the instruction found in practically all civil cases:

> "In considering the evidence in this case, you are not required to set aside your own observation and experience in the affairs of life, but you have a right to consider all of the evidence in the light of your own observation and experience in the affairs of life."

And having admitted the testimony of experts in this case and in the case entitled Merchants National Bank of Aurora, Appellee, v. The Elgin, Joliet & Eastern Railway Company, et al., Appellants, in which the Appellate Court affirmed this trial judge and to find the Supreme Court

likewise affirmed the Appellate and Trial Courts on the admission of expert testimony, and having considered the evidence offered, while not being in full accord with the Appellate Court's directive as to the length of time of the Defendant Stoner's breach of his contract, but feeling bound by the Appellate Court directive, This Court Does Find from a preponderance of credible evidence as to each item of damage in favor of the Plaintiff, The Vendo Company, and that the Plaintiff, The Vendo Company, sustained damages to its business occasioned by Stoner and Stoner's alter ego, Stoner Investments, breach as follows:

(1) The salary forfeiture is the sum of $170,835.00;

(2) That the loss of profits to the Plaintiff Vendo during the period of the breach and by the reason thereof are $2,135,000.00; and

(3) That the diminution in the value of Vendo's business as of June 1, 1969, by reason of the breach is $5,210,500.00.

Whereby It is Ordered, Adjudged And Decreed as follows:

(1) That the Plaintiff Vendo Company does have and recover of the Defendant Harry B. Stoner the sum of $170,853.00;

(2) That the Vendo Company does have and recover of the Defendant Harry B. Stoner and Stoner Investments, Inc., a corporation, the sum of $7,363,500.00; and

(3) That the Plaintiff Vendo Company does have and recover its costs as to each judgment aforesaid and that execution issue forthwith.

Entered: August 13, 1971.

/s/ JOHN S. PETERSEN

Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, **HARRY B. STONER**, and **STONER INVESTMENTS, INC.**, a Delaware corporation, **Plaintiffs,** v. **THE VENDO COMPANY**, a Missouri corporation, **Defendant.**	**No. 65 C 1755**

MEMORANDUM OPINION

[Filed October 21, 1971]

This is a complex anti-trust case involving allegations of monopoly and restraint of trade. 15 U.S.C. Sections 1 and 2. Plaintiffs Stoner and Stoner Investments are defendants in a state court breach of contract suit filed by the defendant Vendo. As an affirmative defense to the state suit, Stoner and Stoner Investments claimed that the contract sued on violated the anti-trust laws. The state court struck the defense, but was reversed. *The Vendo Co.* v. *Stoner*, 105 Ill. App.2d 261, 296-97 (1969). After this decision was rendered, Stoner withdrew the defense in the state court. The case presently before this court encompasses issues which are broader than any presented in the anti-trust defense.

This court was concerned about the res judicata implications of the state breach of contract suit vis-a-vis the federal anti-trust issues, and asked the parties to brief the question. It is clear that the plaintiff cannot be precluded from asserting its anti-trust cause of action in the federal court. The allegations in this suit transcend the allegations in the state court suit, and the relief sought is more

extensive. A less obvious determination is whether the plaintiffs are now precluded from offering as an element of damages any part of a possible state court award. The court is now satisfied, based in large part on its own research, that the two causes of action involved here are sufficiently dissimilar to negate any application of the doctrine of res judicata.

ENTER:

/s/ FRANK J. MCGARR
United States District Judge

DATED: October 21, 1971

Opinion of Illinois Appellate Court for the Second Judicial District in Vendo Co. v. Stoner, 13 Ill. App. 3d 291, 300 N.E. 2d 632 (1973)

THE VENDO COMPANY, Plaintiff-Appellee, v. HARRY B. STONER *et al.*, Defendants-Appellants.

(No. 71-396; Affirmed in part, reversed in part, and remanded.)

Second District—May 29, 1973.

Rehearing denied September 12, 1973.

APPEAL from the Circuit Court of Kane County; the HON. JOHN S. PETERSEN, Judge, presiding.

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

Plaintiff ("Vendo") brought this action in August 1965 in the circuit court of Kane County to recover damages for defendants' breach of non-competition covenants. By amendments to the complaint filed a few months later, Vendo alleged theft by defendants of valuable trade secrets and appropriation of them to their own use and to that of Lektro-Vend Corporation. Following a bench trial the court entered judgment against both defendants, Harry Stoner ("Stoner") and Stoner Investments, Inc. ("Stoner Investments") for $1,100,000 and costs and against Stoner for $250,000. (An injunction was also entered which is not now an issue.) On appeal, after holding that Vendo had no trade secret and was therefore not entitled to any damages for its theft, we affirmed in part, reversed in part, and remanded the case to the trial court with directions to determine damages for breach of the covenants not to compete consistent with the views expressed in our opinion. *Vendo Co.* v. *Stoner,* 105 Ill.App.2d 261.

At the conclusion of the trial on remand the court entered judgment against both defendants for $7,345,500 and costs and against Stoner, individually, for $170,835 and costs.

Our opinion on the prior appeal presents the relevant facts and sets forth the pertinent non-competition provisions of the sales agreement and the employment contract. (*Vendo Co.* v. *Stoner,* 105 Ill.App.2d at 267-268.) Therefore they need not be restated here. However, we will advert in this opinion to evidence adduced at the trial on remand.

The principal question presented is whether the judgment against both defendants for $7,345,500 is contrary to the law of the case established by the prior appeal, and whether it is outside of the issues framed by the complaint.

It would unduly prolong this opinion to set forth in detail the evidence as to damages received by the court (over defendants' objections).[1] We will confine ourselves to summarizing the evidence when necessary. Perhaps the nature of Vendo's evidence as to damages on remand can be succinctly indicated by Vendo's counsel's own words in his opening statement as being: (a) "What Vendo lost by way of sales by not having this (Lektro-Vend) machine, if that resulted from the conduct of Mr. Stoner," and (b) "the depreciation—or the diminution of the value of the company as of 1969 as a result of Mr. Stoner's activity and the failure to have the Lektro-Vend machine if that resulted from Mr. Stoner's activity."

In its complaint Vendo pleaded two theories of liability: (a) theft of a trade secret, and (b) breach of the covenants not to compete by directly or indirectly entering into the vending machine business through Lektro-Vend. In the first appeal we held that Vendo had no trade secret, and that the judgment which was predicated upon the theory of its theft was erroneous. However, we held that the non-competition covenants were valid and that they were breached by defendants, stating: "We are thus limited to ascertaining the proper measure of damages for breach of

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[1] The record in this case is voluminous; the abstract of the record alone of the trial on remand consists of 598 pages; the book of exhibits on re-trial is about 2" thick.

the covenants not to compete." (*Vendo Co.* v. *Stoner,* 105 Ill. App.2d at 288.) We further stated at page 291: "[T]he value of the Lektro-Vend machine, [upon which the earlier judgment of $1,100,000 was based] • • • is neither an element nor a yardstick of damages for a breach of the non-competition covenants," and held instead that "Vendo should be permitted to recover an amount equal to the net profits it lost and might reasonably be expected to lose, plus the amount by which the value of its business will have been diminished as of June 1, 1969, because of defendants' wrongful competition."

At the trial on remand Vendo made no attempt to prove lost profits caused by defendants' "wrongful competition". Instead, it relied principally on the testimony of two experts, both of whom acknowledged that their theory for the computation of damages was loss of sales from the absence of a FIFO[2] machine and that Stoner was responsible for Vendo's lack of such machine. These experts relied substantially on a report made by Vendo's manager of business research making estimates of percentage of the confection vendor market taken over by FIFO vendors as distinguished from the older drop-shelf type. This very report warned that it did not include a sufficient number of operators to make a determination, and that therefore "inferences concerning competitive positions within the total market should be avoided." The figures of both experts on lost profits and on diminution of the value of the business were premised on Vendo's failure to have FIFO, and on Stoner's responsibility for such failure.

Neither the evidence in the first trial nor in the trial on remand establishes that Stoner was responsible for Vendo's failure to have FIFO. Our prior opinion describes Vendo's unsuccessful efforts to build a FIFO in 1959-60 (*Vendo Co.* v. *Stoner,* 105 Ill. App.2d at 271-273), and, at page 274,

[2] FIFO equals "first-in-first-out", *i.e.* a machine where the first product stocked would be the first one sold.

Stoner's recommendation in March 1963 for Vendo's purchase of Lektro-Vend's FIFO machine. When Stoner's recommendation was rejected, he told Vendo that the future will show that Vendo's failure to acquire it was "a serious mistake". Vendo had decided against developing a FIFO twice before that occasion.

After 1963 Vendo continued to reject the development of a FIFO machine, even after repeated urging by its salesmen. At the time of the trial on remand, April-May, 1971, Vendo was finally almost ready to begin production with a FIFO snack vender. This development resulted as a spin-off from its contract with Lance Company, a large buyer of vending machines on a bid contract basis.

1 Vendo's failure to have a FIFO vending machine is not attributable to defendants. The computation of damages for a loss of profits during defendants' breach and the diminution in the value of its business was not based on defendants' "wrongful competition" and therefore did not conform to the decision and mandate of this court. (*Vendo Co.* v. *Stoner,* 105 Ill. App.2d at 291.) On reversal of a judgment and remand by a court of appellate jurisdiction the trial court can take only such proceedings as conform to the judgment of the reviewing court. *People ex rel. Bauer* v. *Henry,* 10 Ill.2d 324; *Berry* v. *Lewis,* 27 Ill.2d 61, 62-63; *Fiore* v. *City of Highland Park,* 93 Ill. App.2d 23, 34.

2, 3 Lost profits in a non-competition case are those which were diverted from the plaintiff as a result of defendants' sales as plaintiff's competitor (*Long* v. *O'Bryan,* 28 Ky. L.Rep. 1062, 91 S.W. 659, 660; *Stewart* v. *Challacombe & Ramsey,* 11 Ill. App. 379, 382), and plaintiff's damages must be such as were sustained by defendant's breach of contract and were a "normal and proximate consequence of the breach • • •" (*Hitchcock* v. *Anthony,* 83 F. 779, 783.) Although liberality may be used in estimating damages after it has been shown that they were caused by illegal acts, "this liberality does not extend to proof that the damages were caused by the illegal acts." (*Dantzler* v.

Dictograph Products, Inc., 309 F.2d 326, 330, *cert. denied*, 372 U.S. 970.) The fact that Vendo suffered losses subsequent to defendants' breach of the non-competition covenants does not of itself establish a casual connection. The damages recoverable by Vendo are only those which are a normal and proximate consequence of defendants' breach of those covenants.

4, 5 Diminution in the value of the business is the amount by which the value of the good will of the business has been impaired at the end of the term of the non-competition covenants. (*Bauwens* v. *Goethals*, 187 Ill.App. 563, 572; see also, *McCook Window Co.* v. *Hardwood Door Corp.*, 52 Ill. App.2d 278, 287-288.) If upon remand Vendo fails or is unable to prove any lost profits or diminution of business "because of defendants' wrongful competition" it would be entitled to recover only nominal damages. *Maren* v. *Wolmer*, 343 Ill. App. 353 (abstract opinion); *Scotton* v. *Wright*, 32 Del. 192, 121 A. 180, 185; *Shaw* v. *Jones, Newton & Co.*, 133 Ga. 446, 66 S.E. 240, 242.

A further contention of defendants is, in effect, that because of additional facts adduced after remand, the judgment of $170,835 entered against Stoner individually is erroneous. A discussion of defendants' argument will not serve any useful purpose and would only prolong this opinion. We need only state that in entering that judgment the trial court complied with our mandate on the prior appeal as it was bound to do. (*Sawicki* v. *Clemons*, 411 Ill. 28, 30; *People* v. *Militzer*, 301 Ill. 284, 287.) Defendants had ample opportunity to introduce at the first trial any pertinent evidence relative to the facts upon which that liability was predicated. They did not do so. There must be an end of litigation somewhere and the judgment of $170,835 is affirmed.

Defendant further argues that the trial court (before the trial on remand) should have allowed defendants' motion to reinstate their Illinois anti-trust defenses and counterclaim. In our prior opinion we affirmed the trial court's

striking of these affirmative defenses and counterclaim bounded on alleged violation of Illinois anti-trust laws. (*Vendo Co.* v. *Stoner*, 105 Ill.App.2d at 298,299.)[3] Subsequent to this court's prior opinion the Illinois legislature enacted section 7.9 amending the Illinois Antitrust Act, effective July 1, 1969 (Ill. Rev. Stat. 1969, ch. 38, sec. 60—7.9) to provide as follows:

> "No action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce."

The Attorney General of Illinois, as *amicus curiae*, supports plaintiff's argument on this point.

6 Even if it be assumed that the State legislature had the authority to enact this amendatory provision, we are unable to ascribe to it retroactive application to contracts entered into five years earlier. Our affirmance in the prior opinion of the trial court's dismissal of the State antitrust defense and counterclaim became the law of the case on remand. The trial court properly refused to allow reinstatement of the defense and counterclaim based on the amendment of the Illinois Antitrust Act.

In view of our decision we regard it as unnecessary to discuss other contentions of the parties.

The judgment of the trial court is therefore affirmed in part, reversed in part, and remanded for further proceedings consistent with the views expressed herein.

Affirmed in part, reversed in part, and remanded with directions.

GUILD, P. J. and T. MORAN, J., concur.

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[3] In that opinion we also held at page 297 that the trial court erred in striking the federal antitrust defenses without a hearing. Before trial on remand defendants by leave of court dismissed that defense without prejudice. *Vendo Co.* v. *Stoner*, 105 Ill. App.2d 261, 297.

Opinion of the Illinois Supreme Court in Vendo Co. v. Stoner, 58 Ill. 2d 289, 321 N.E. 2d 1 (1974)

(No. 46228, 46231 cons.—Appellate court reversed; circuit court affirmed.)

THE VENDO COMPANY, Appellant and Appellee, v. HARRY B. STONER *et al.*, Appellants and Appellees.

Opinion filed Sept. 27, 1974.—Modified on denial of rehearing Nov. 27, 1974.

Appeal from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Kane County; the Hon. John S. Petersen, Judge, presiding.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

This appeal is the outgrowth of litigation which commenced in 1965 with the filing of a complaint in the circuit court of Kane County by plaintiff, The Vendo Company, against Harry B. Stoner and Stoner Investments, Inc., a company of which Stoner is the president and whose sole stockholders are Stoner and his wife.

The case was tried without a jury and resulted in a judgment against Stoner in the amount of $250,000 and a judgment against Stoner and Stoner Investments, Inc., of $1,100,000. An appeal was taken by defendants to the Appellate Court for the Second District, and that court reversed the judgment in part and remanded the cause for further hearings with respect to the amount of damages properly recoverable by the plaintiff. (*Vendo Co.* v. *Stoner* (1969), 105 Ill. App. 2d 261.) Plaintiff filed a petition for leave to appeal which was denied by this court.

Following the hearings on remand the circuit court entered a judgment against Stoner for $170,835 and a judgment against both defendants for $7,345,500. The case was again appealed to the appellate court by defendants. That court affirmed the judgment awarding damages against Stoner individually, but it reversed the judgment rendered

against the two defendants jointly for $7,345,500, and remanded the cause for additional hearings as to the amount of damages. (*Vendo Co.* v. *Stoner* (1973), 13 Ill. App. 3d 291.) Each party filed a petition for leave to appeal, and each petition was allowed.

The intricate and prolonged litigation now before us concerns the development and marketing of a new and successful type of candy-vending machine by a concern called Lektro-Vend, allegedly with the active support of each defendant, during the period when Stoner was an employee and a director of plaintiff. Before discussing the two decisions hitherto rendered and the contentions now made by the parties, it is necessary to review various events which took place in 1959 and thereafter.

In April of 1959 the defendant Harry B. Stoner was the president and the controlling owner of Stoner Manufacturing Corporation, an Illinois corporation with its principal place of business in Aurora, Illinois, and a predecessor of the corporate defendant here. Stoner Manufacturing Corporation had been engaged for many years in the business of making and selling candy-vending machines throughout the United States. The plaintiff, a Missouri corporation located in Kansas City, Missouri, was at that time engaged in the business of manufacturing and selling vending machines designed to handle beverages, ice cream, and various other products. It did not make a machine for vending candy, but at least as early as 1958 it had considered the possibility of making a candy-vending machine, and had undertaken some research into that matter.

In April, 1959, plaintiff and Stoner Manufacturing Corporation entered into a contract for the purchase by plaintiff of the assets of the corporation, including inventions, patents, drawings, designs, and research and development work. Plaintiff's purpose in making the acquisition was in part to add a candy-vending machine to its line. So far as Harry B. Stoner was concerned, the motive for the sale

appears to have arisen from a concern that the poor state of his health would prevent him from continuing in the active direction of his company.

Under the sale agreement plaintiff was to pay the Stoner Manufacturing Corporation $3,400,000 in cash and to deliver to it 60,000 shares of plaintiff's stock. The land and the property constituting the Stoner Manufacturing Corporation plant was leased to plaintiff at a stipulated rental for 10 years with an option of renewal for a like period. Plaintiff was also given an option to purchase the property on or after December 31, 1961.

Plaintiff agreed to pay annually, for a period of 10 years or until such time as it might exercise its option to purchase the plant, all profits in excess of $250,000 realized from the use of the assets being purchased. Any amount theretofore paid by plaintiff out of profits was to be credited upon the purchase of the plant. Plaintiff further agreed to pay, for a period of 10 years, 25% of the income received from foreign sales realized from the use of the assets being purchased.

The corporation agreed to use its best efforts to preserve its business organization intact, and to keep available to plaintiff the services of its present officers and employees.

The sales contract contained several restrictions on competition by the selling corporation. The contract specified:

> "From and after the closing, the Company [*i.e.*, Stoner Manufacturing Corporation] will not own, directly or indirectly, manage, operate, join, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business engaged in the manufacture and sale of vending machines under any name similar to the Company's present name, and, for a period of ten (10) years after the closing, the Company will not in any manner, directly or indirectly, enter into or engage in

> the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by the Company. The Company also agrees that during its corporate existence it will, without incurring any financial obligation, co-operate with Vendo to prevent the use by others of the names 'Stoner' and 'Stoner Mfg. Corp.' in connection with any business similar to that now carried on by the Company and also agrees not to disclose to others, or make use of, directly or indirectly any formulae or process now owned or used by the Company."

On June 1, 1959, Stoner executed an employment contract with plaintiff. The contract recited plaintiff's desire to employ Stoner's services, and it stated that the value of his services consisted of his "advice and counsel in the operation of the Aurora, Illinois, facility, and his know-how, experience and reputation in the vending machine field."

A paragraph of the employment contract also contained a limitation on competition. It provided:

> "5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company [*i.e.*, the Vendo Company] or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or salesman for any person, firm or corporation or as an officer or director of a corpo-

ration or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter."

The candy-vending machine which was being manufactured by Stoner Manufacturing Corporation at the time it sold its assets to plaintiff in 1959 was a model which is called a "drop shelf" machine in the jargon of the trade. The "Lektro-Vend" model subsequently developed by the Lektro-Vend Company possessed three significant advantages over the drop-shelf model which made it popular and successful with companies, known as "operators," who purchase and service vending machines. The first of these advantages was that the machine could sell candy bars in the same order in which it had been stocked, a method called "FIFO," standing for first-in, first-out. The FIFO design produced savings to the operator by reducing the risk of having to vend or to discard stale items, and reducing the frequency of service calls to restock the machine. The second advantage of the Lektro-Vend model was that it permitted a continuous visible display of the item which was next to be vended. Thirdly, the Lektro-Vend employed a type of construction which permitted more than one type of product to be stocked on a single conveyor, thus eliminating the need to exhaust one product line before replacing it with a second. While each of these traits had been in existence for some years, Lektro-Vend was the first to combine all of them in a single machine having a practical design.

As a result of research into the possibility of developing a vending machine of this character, plaintiff, in August, 1959, had built two developmental models, sketches of which were shown to Stoner. Representatives of plaintiff, while agreeing on the desirability of developing a machine with

such capabilities, considered his particular prototype to be defective in certain mechanical respects and also as being too expensive to produce. The research project for the machine was accordingly shelved.

In mid-1960, two engineering employees of plaintiff, Rod Phillips and his son William, each of whom had been employed by the Stoner Manufacturing Corporation prior to the date of the sale of its assets to plaintiff, became dissatisfied with their job situation with plaintiff and resigned. At this time certain disagreements had developed between Stoner and plaintiff as to Stoner's role in plaintiff's operations, which Stoner considered should be more than the merely advisory function to which plaintiff had, in his view, assigned him.

No evidence was introduced to show that Stoner played any part in inducing the resignation of either of these employees of plaintiff, but each of them approached Stoner after his resignation, and solicited his financial support in the design and development of certain devices. William Phillips, in mid-1960, induced Stoner to pay him a salary while he designed an electronic coin-detecting device. The machine, as the appellate court concluded, had no functional relation with the subsequent development of the Lektro-Vend machine, and consequently has no bearing on the claim made by plaintiff against defendants.

In late 1960 or early 1961, however, Rod Phillips approached Stoner with a request that Stoner provide financial support to cover the development of a vending machine, of the new type which has already been described, and Stoner agreed to do so. Stoner testified that the understanding was that Phillips would own the machine, if it were developed, and would be entitled to any profits earned from it. There is no confirmation of Stoner's testimony in this regard. Rod Phillips was not called as a witness because of a medical representation that his physical condition was unsatisfactory. While a stipulation was entered on the record as to what his testimony would have been

had he appeared, the stipulated testimony did not refer to the prospective ownership of the machine.

Interest-free loans which aggregated some $200,000 were made to Philips by Stoner Investments during 1961 and 1962. Some of these funds were used to buy equipment necessary for the engineering of the machine. Stoner also made available rent-free a building owned by him for use in conducting the development work. In 1961, when two more former employees of Stoner Construction Corporation, who had had experience in design and toolmaking, resigned from employment with plaintiff, they joined Rod and William Phillips on the research and development project. They received monthly salaries aggregating $1,150 from Stoner Investments.

By October, 1962, the developmental work on the new machine had progressed to the point where a prototype could be exhibited at a trade show held in San Francisco. The model shown differed in many important respects from and was a major improvement upon the device which plaintiff had worked on in 1958 and 1959, and it won a very favorable reaction in the industry.

Following the trade show, which had been attended by several of plaintiff's personnel, and the return of Rod Phillips to Illinois, several important developments took place. Their sequence and the exact dates when they occurred are not made wholly clear by the evidence, but in main outline they can be summarized as follows.

Shortly before December 18, 1962, on which date plaintiff's board of directors was to meet, Stoner asked the chairman, Elmer Pierson, to be released from his employment contract, stating that he had an opportunity to invest in the manufacture and sale of the Lektro-Vend machine. Stoner did not disclose that he had already been giving support to the development of Lektro-Vend.

Plaintiff refused to release Stoner from his contract. A letter dated January 2, 1963, from Pierson explained the refusal in the following language:

> "I have always felt that one of the major advantages of the Stoner acquisition contract, from our standpoint, was the fact that it guaranteed that your design genius and experience would never be coupled with our money to put a new and most formidable competitor into the business against Vendo. I can assure you that nothing has happened in recent years to change our position on this matter in any way. I am sure you will understand."

Pierson went on to say that plaintiff itself had an interest in buying the Lektro-Vend. He asked Stoner to ascertain if Phillips had any interest in selling it, and if so, to set up a meeting between Phillips and representatives of plaintiff. Stoner then wrote one of plaintiff's vice-presidents, Spencer Childers, that Phillips would be willing to sell if the price were high enough. Stoner told plaintiff that Phillips wanted $1,500,000, and that a third company had expressed a willingness to pay that amount.

A meeting did take place between Phillips and representatives of plaintiff in the later part of January, 1963. The purpose of the meeting was to show plaintiff's representatives how the Lektro-Vend worked, and the record does not indicate that price was discussed. In March, Stoner informed plaintiff that he had told Phillips that he assumed, in the absence of further word from Childers, that plaintiff no longer had had an interest in making the purchase. Childers wrote back on April 9 stating that plaintiff did still have such an interest, but that the asking price of $1,500,000 was too high. Plaintiff stated that it was, however, prepared to pay a lower price which would be enough to cover development costs and return a fair profit to Phillips and his associates. The record does not indicate whether this counteroffer was transmitted to Phillips. In any event Stoner testified that the "negotiations" between Phillips and plaintiff terminated at this time.

It must be added that the record casts some doubt on whether at this time Phillips seriously entertained any intention of selling the Lektro-Vend design at all, rather than going into the manufacture and sale of these machines himself. Mrs. Ruth Netrey, Stoner's sister-in-law, testified that back in December, 1962, Phillip's had called her to request a loan to assist him in connection with the manufacture of a vending machine he was developing. Mrs. Netrey initially lent Phillips $350,000, which was later increased to $525,000, at an interest rate of 4½%. No payment was made on either principal or interest until September, 1963, at which time Mrs. Netrey received a note for the amount due her from the Lektro-Vend Corporation, which had just been organized. The proceeds of the loan were used in part to pay off the loan due Stoner, as Mrs. Netrey and Stoner each knew. Stoner testified that his notes were repaid because he had to "withdraw his support" when Phillips wanted to go into manufacturing.

During 1963 Rod Phillips proceeded with his plans to set up a manufacturing operation, and in March or April Stoner Investments completed the construction of a building in Aurora which was made available to Phillips for this purpose.

Stoner had a further conversation with Pierson in the spring or summer of 1963, in which Pierson inquired as to the actual extent of Stoner's involvement with Phillips. Stoner told him that the relationship had been confined to loans and that these had since been repaid by another person. Stoner did not disclose that this other person was his sister-in-law. This conversation marked the first occasion on which Stoner disclosed any involvement with Lektro-Vend, and the disclosure was far from complete.

The Lektro-Vend Corporation was formed in September. Its original stockholders were Rod Phillips and William Phillips, certain other employees, and Mrs. Netrey, who held 50% of the stock. Neither Stoner personally nor Stoner Investments was a stockholder at that time.

In March, 1964, shortly before Stoner's contract with plaintiff was to lapse, Stoner Investments contracted to sell to Lektro-Vend the new plant which had been built by Stoner Investments during the previous year. The purchase was made with the proceeds of a bank loan which was advanced subject to an agreement by Stoner Investments to guarantee the repurchase of the property in the event of a default on the loan.

Stoner's contract of employment terminated June 1, 1964, and it was not renewed. Although the appellate court in its first opinion states that Stoner remained on the board of plaintiff until the spring of 1965, defendants refer us to testimony by Stoner that he ceased being a director in March or April of 1964, and that testimony was corroborated by testimony of plaintiff's secretary.

On June 10, 1964, Lektro-Vend issued 5,000 shares of stock to Mrs. Stoner, and on July 15 it issued 5,000 shares of stock to Stoner Investments. In the years of 1965 and 1966, loans exceeding $350,000 were made to Lektro-Vend by Stoner Investments or another company controlled by Stoner.

In March, 1965, Stoner sent a letter to 50 vending-machine operators in which he identified himself as the longtime former president of the old Stoner Manufacturing Corporation, and stated that he was now interested in Lektro-Vend. The letter contained the following passage:

> "I believe that I can lay claim to having personally initiated the design and production of more vending machines still in use than any other one man in the history of vending. I believe that vending machines of my design still in use are making operators better than a million dollars a week right now and I am willing to risk my reputation as a vending machine designer and manufacturer to say that the LEKTRO-VEND products will set new highs in earnings to operators and will be the standard of comparison for the next 50 years."

The letter was plainly intended not only to associate Lektro-Vend with Stoner, but to convey to a reader the impression that Lektro-Vend would receive the benefits of the skill and reputation which Stoner had enjoyed as the head of Stoner Manufacturing Corporation.

Plaintiffs' original complaint contained two counts, the first directed against Stoner individually and the second against Stoner Investments. Each count alleged a breach of the covenants not to compete contained in the sales and employment contracts, and each sought recovery in the amount of $500,000. Plaintiff subsequently amended each count to include additional allegations seeking recovery for the theft of a trade secret, a claim predicated on Stoner's having seen in 1959 the sketches of the prototype developed by plaintiff. The amount of the *ad damnum* was also raised to $1,500,000 on each count, and later to $7,000,000.

As previously noted, the trial court entered a judgment against Stoner individually for $250,000 and a judgment against Stoner and Stoner Investments jointly for $1,100,000. As viewed by the appellate court in its first opinion the first judgment was intended to represent a forfeiture of Stoner's salary during a 4-year period during which his breach of duty was occurring. The larger sum represented the damages allowable on the trade-secret theory, calculated on the basis of the $1,500,000 which Stoner had said Lektro-Vend was worth in 1962, less $400,000 for the estimated costs of developing it.

The appellate court rejected the claim based on the theft of a trade secret, on the grounds that in 1959 plaintiff was in possession only of an idea or a goal which had not been reduced to a specific means of accomplishment, that any disclosure to Stoner had been incomplete, and that the substantial differences between the plaintiff's prototype and the Lektro-Vend made it unlikely that the knowledge of the former could have contributed to the development of Lektro-Vend. The appellate court did hold, however, that plaintiff was entitled to damages over and above the

$250,000 to the extent that there were lost profits which were attributable to the breach of the covenants and diminution of its business, and the court remanded the cause to the circuit court for further evidence on this issue.

The principal issue which now divides the parties is whether the trial court on the remanded hearing measured damages according to the proper standard. Plaintiff makes the claim, which the trial court accepted, that plaintiff is entitled to a sum equal to what its profits would have been had plaintiff been the owner of Lektro-Vend. Defendants maintain plaintiff can recover only those lost profits attribuable to the fact that the products which plaintiff did in fact make and sell had to compete with the Lektro-Vend machine. The latter figure, each party appears to assume, would be much smaller than the former, for it would be necessary to exclude from it any losses attributable to other causes, such as competition from companies other than Lektro-Vend, the inferiority of plaintiff's dropshelf machines as compared to the Lektro-Vend, and the fact that the market for candy-vending machines contains several submarkets, some of which were not served by both plaintiff and Lektro-Vend to the same extent.

Quite apart from any liability which may be predicated upon a breach of the covenants against competition contained in the sales agreement and the employment contract, it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and an officer of plaintiff. Beginning in 1960 or 1961 and continuing up until just before he ceased to be employed by plaintiff he contributed substantial financial support, either directly or through Stoner Investments, Inc., to the development of a superior machine which would be competitive with the older and less satisfactory model produced by plaintiff. Stoner testified that up until a date shortly before the Lektro-Vend was publicly exhibited he did not see the models, and Phillip's testimony confirms this. Stoner also testified that until that time he did not even know that

Phillips was working on such a machine. This latter testimony, however, was contradicted both by testimony given by Stoner on his deposition and by Phillips. In view of the substantial amounts which he was spending on Phillip's research project, moreover, Stoner's testimony that he never inquired as to Phillip's activities or visited the plant to inspect the work in progress is highly implausible. We conclude, as the trial court must have concluded, that Stoner was fully aware of the nature of the device which was being developed and also of its competitive potential. Indeed, Stoner himself testified that when he first observed the finished Lektro-Vend he called it "the vending machine of the future," and predicted that it would render other models obsolete.

Stoner was hired by plaintiff on the basis of the skill and experience which he could bring to plaintiff. Defendants contend that plaintiff did not take advantage of Stoner's talents and gave him the role of a mere figurehead. Assuming that plaintiff, whether prudently or imprudently, failed to make the best use of Stoner's abilities, such a failure certainly did not release Stoner from his duty not to assume a position which would be adverse to that of his employer.

In addition to his prior and subsequent support of Phillip's development of Lektro-Vend, Stoner's actions in respect to plaintiff's unsuccessful attempts in late 1962 and early 1963 to purchase the design violated his fiduciary obligations. In view of Stoner's prior expression of a desire to leave plaintiff's employment so that he could become associated with Phillips, it was perhaps naive of plaintiff to assign Stoner himself as its intermediary. Had he disclosed the extent of his financial involvement in the Lektro-Vend, it may be doubted whether plaintiff would have done so, rather than dealing with Phillips directly or through some other agent.

Stoner had a foot in each camp. Not only did his undisclosed individual interest in controlling the further development and ultimately the manufacture and sale of the Lektro-

Vend create the possibility of his taking an unfair advantage of plaintiff, but the evidence gives strong indication that he actually misled plaintiff while he was purportedly acting as plaintiff's agent with regard to plaintiff's possible acquisition of the Lektro-Vend. The information given plaintiff that Phillips wanted a price of $1,500,000 for the Lektro-Vend came only from Stoner. Whether Phillips might have been willing to sell at a lower figure acceptable to plaintiff is unknown.

We recently had occasion in *Kerrigan* v. *Unity Savings Association* (1974), 58 Ill.2d 20, to consider the obligation upon a director or officer to make full disclosure to his corporation. In that case, involving the appropriation of a business opportunity, the defense was made that the plaintiff, a savings and loan association, lacked the legal power to engage in the business which defendants were carrying on, which was the operation of an insurance agency. We rejected that defense for the reason that the association had never been given the opportunity to decide that question for itself. We said:

> "••• if the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full discloure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations. If directors fail to make such a disclosure and to tender the opportunity, the prophylactic purpose of the rule imposing a fiduciary obligation requires that the directors be foreclosed from exploiting that opportunity on their own behalf." 58 Ill.2d at 28.

See also the discussion of the fiduciary duties of officers and directors by the appellate court in *Paulman* v. *Kritzer* (1966), 74 Ill. App. 2d 284, 289-295, which was specifically endorsed by this court in our affirmance of that decision. *Paulman* v. *Kritzer* (1967), 38 Ill.2d 101, 104; *cf. Lerk* v.

McCabe (1932), 349 Ill. 348, 360-362; Restatement (Second) of Agency secs. 387, 389, 391, 393, 394 (1958).

Plaintiff was not, as defendants urge, limited to the recovery of the profits which accrued to Lektro-Vend. (See Restatement (Second) of Agency secs. 399, 401, 407 (1958).) The limitation on a plaintiff's recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk. For if his misconduct were discovered the most that he could lose would be the profit gained from his illegal venture; the law would have operated only to restore him to the same position he would have been in had he faithfully performed his duties.

Defendants repeatedly state that the failure of plaintiff to develop a FIFO-type machine showed a lack of interest on its part. We have reviewed the testimony and we conclude that plaintiff did have and retained an interest in having such a machine. Its failure to develop one itself initially rested on problems in the design of the particular model which had been developed. The instances in which plaintiff, after 1962, failed to develop such a machine seem in part to be explained by a concern that several other companies had by then developed similar machines and that it might be too late for plaintiff to successfully enter the market. We are not called on here to review the business prudence of plaintiff's decisions, however, and we cannot say that plaintiff would have declined an offer to purchase the Lektro-Vend, with its advanced technology, or to seek to develop such a machine itself had a genuine opportunity to do so been extended to it.

Defendants assert that the evidence introduced by plaintiff on the remand and the theory on which it was offered did not comport with the law of the case as established by the first opinion of the appellate court nor with the court's mandate. Plaintiff disputes defendants' interpretation of the first opinion of the appellate court. We need not consider this point, however, since the doctrine of the law of the case is not applicable to this court in reviewing the

judgment of the appellate court. *Sjostrom* v. *Sproule* (1965), 33 Ill.2d 40.

Defendants also urge that the plaintiff has impermissibly changed the theory of its case from that on which it relied in the first trial. We think that defendants' contention represents an artificial analysis. In some situations there could be, of course, a violation of a covenant not to compete without the breach of a fiduciary duty, as would be the case if Stoner had not been an officer and director of plaintiff. In the present case, however, the acts of defendants in misappropriating the Lektro-Vend and their use of it to compete against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff.

We are not confronted here with the situation in which a litigant attempts to interject on appeal a theory never advanced in the trial court. Plaintiff made its theory quite explicit in the trial on remand. It is a familiar principle, moreover, that when an appeal is taken the appellee may defend the judgment below on any ground appearing of record. (*Shaw* v. *Lorenz* (1969), 42 Ill.2d 246, 248.) We fail to see how defendants have suffered any prejudice from any supposed change in the theory on which plaintiff has presented its case.

The remark made in *People ex rel. Modern Woodmen of America* v. *Circuit Court* (1931), 347 Ill. 34, 47, relating to piecemeal litigation, on which defendants rely, was made in a discussion of the extent to which matters which had been or could have been litigated in one suit are barred by *res judicata* from being relitigated in a second suit involving the same subject matter. The case is not in point here.

Finally, defendants contend that the evidence offered on the remand and the judgment of the trial court are not in conformity with the allegations of the complaint, since the complaint charges defendants only with breach of the covenants not to compete. For the reasons given above, we do

not think the defendants' point is well taken. In any event, so far as the complaint might be thought to be deficient, plaintiff, before submission of this case for decision, filed a motion under Rule 362 to amend the complaint in order to conform it to the proof. Defendants filed objections to the motion, and we took the motion with the case. Essentially the proposed amendment adds to the existing allegation that Stoner indirectly and directly entered into the vending-machine manufacturing business through the provision of financing, advice and use of facilities, the further allegation that Stoner did so as an officer and as a director and that his actions were "for the development of an economically and functionally successful vending machine complementary to the product line of the plaintiff corporation, all of which was done without the knowledge, consent, or approval of the plaintiff corporation." The motion to amend is accordingly allowed.

Defendants also contend that the covenants against competition contained in the sale agreement and the employment contract were illegal restraints of trade. The basis for this claim is that each covenant covered an excessively broad geographical area, namely an area coterminous with all areas in which plaintiff was doing business, and, in the case of the employment contract, any additional areas into which plaintiff, to Stoner's knowledge, planned to extend its operations. Defendants state that the covenants were broader than the protection necessary to plaintiff warranted and should have been confined to those areas in which the predecessor of Stoner Investments had been functioning.

Defendants further claim that the covenants were in fact not breached, since the activities of defendants fell short of directly or indirectly entering into the vending-machine business. The appellate court concluded, in our opinion correctly, that defendants' activities directed toward the development and thereafter the marketing of the Lektro-Vend, consisting of substantial financial aid, and the provision of

physical facilities, as well as defendant's ownership interest in the Lektro-Vend enterprise, were so substantial as to go beyond the limits established by the covenants.

Regardless of the appellate court's disposition of those restraint-of-trade issues, the defendants may, as we have pointed out, be held liable on the ground of a breach of fiduciary obligation on the part of Stoner. Although arguing in their brief that the covenants not to compete are wholly invalid, defendants somewhat inconsistently maintain in this connection that those same covenants were effective limitations upon what might otherwise be the full sweep of their fiduciary duties. In this connection defendants rely on *Anderson* v. *Dunnegan* (1933), 217 Iowa 672, 250 N.W. 115. That case, like this one, involved a charge that business opportunities of an enterprise had wrongfully been diverted to an outside concern. The business there involved was originally conducted as a partnership and later incorporated. The decision rendered against plaintiffs, however, was based on the court's finding that a majority of the other partners, subsequently stockholders in the corporation when the latter was formed, had knowingly acquiesced in the diversion. No such elements play a role here.

At the original trial defendants raised as an affirmative defense and by way of counterclaim a charge that the sale agreement and the employment contract violated both the Illinois Antitrust Act (Ill. Rev. Stat. 1973, ch. 38, par. 60-1 *et seq.*) and the Federal antitrust laws (15 U.S.C. sec. 1 *et seq.*). The latter charge was withdrawn by defendants on the remand, and references in the record indicate that at some point a suit was filed against plaintiff in the United States District Court for the Northern District of Illinois relating to the alleged violations of Federal law.

With respect to the State antitrust claim the appellate court on the first appeal affirmed the action of the trial court in striking the affirmative defense and counterclaim. On the remand defendants unsuccessfully sought to reinstate their defenses and counterclaim, and the appellate

court again affirmed the judgment of the trial court in this respect. By leave of court the State of Illinois has filed a brief supporting defendants' position on this issue.

There is some dispute between the parties as to whether the first opinion of the appellate court was based on the theory that the Illinois act was preempted by the Federal antitrust laws or upon the inapplicability of the Illinois act because of the absence of a substantial impact in Illinois arising out of the acts complained of.

We prefer to dispose of this issue on another ground, namely that the Illinois act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by defendants. It is familiar doctrine that statutes will ordinarily not be construed so as to produce retroactive application, absent some clear expression of an intention to do so. The rule is peculiarly applicable, for constitutional reasons, where a criminal statute is involved. Such is the case here with the Illinois Antitrust Act, even though the particular portion of the Act being relied on is the section creating a right in private parties to bring a civil suit for damages, including in some instances treble damages. Ill. Rev. Stat. 1973, ch. 38, par. 60-7.

Various challenges are made by defendants to the evidence of damages which was adduced by plaintiff with respect to the $7,345,000 judgment entered against both defendants jointly. To a large extent defendants' objections represent no more than a rejection of the underlying theory of liability which we have held is applicable, namely, that plaintiff is entitled to be compensated for the difference between the profits which it could reasonably be expected to make if it had been the owner of the Lektro-Vend and the profits which it did in fact earn from the sale of candy-vending machines.

In our consideration of this facet of the appeal we are mindful of two limiting factors. The first is that the loss of

profits, whether past or future, claimed to arise out of exclusion from a market is customarily not susceptible of detailed or direct proof, and that unless proof of an inferential character is permitted, the result would be to immunize a defendant from the consequences of his wrongful acts. That principle has been frequently enunciated by the Supreme Court of the United States in the context of actions to recover damages resulting from violations of the Federal antitrust laws. (See *Bigelow* v. *RKO Pictures, Inc.* (1946), 327 U.S. 251, 264-265, 90 L. Ed. 652, 660; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.* (1969), 395 U.S. 100, 123-124, 23 L.Ed. 2d 129, 148-149, 89 S. Ct. 1562). The principle is equally applicable where the claim of lost profits arises from a violation of fiduciary obligations or breach of contract. See *Schatz* v. *Abbott Laboratories, Inc.* (1972), 51 Ill.2d 143, 147-149.

The second limiting factor is that, as noted in the *Schatz* decision (51 Ill.2d at 149), the assessment of damages by a trial court sitting without a jury will not be set aside unless it is manifestly erroneous.

The judgment of $7,345,000, according to the trial court, was the sum of the profits lost to plaintiff between 1962 and June 1969, during the period of defendants' breach ($2,135,000), and the diminution in the value of plaintiff's business as of June, 1969, attributable to defendants' activities ($5,210,500).

The former figure was derived from data showing the sales of vending machines, obtained from surveys conducted for plaintiff, corporate records of plaintiff and publications of the United States Department of Commerce.

The sales data showed that plaintiff, after acquiring the assets of the Stoner Manufacturing Corporation, had a share of the candy-vending market, calculated in terms of the dollar amount of sales, of about 31%, and that for the 10-year period from 1959 to 1969 plaintiff had approximately the same share of the market for vending machines

other than those used for vending candy. Between 1962, just before the Lektro-Vend machine came on the market, and 1969, plaintiff's share in the candy-vending machine market shrank to slightly over 16%, whereas its share of the noncandy-vending-machine market remained stable. Plaintiff's actual sales of candy-vending machines in 1962 amounted to about $5,400,000. In 1969 they were $4,166,000. By way of contrast the sales of Lektro-Vend rose from $48,000 realized in 1963, its first year of production, to $2,298,000 in 1969. Its sales for the entire period aggregated about $7,000,000.

The theory on which plaintiff proceeded was based on the proposition that if plaintiff had had the Lektro-Vend, it would have continued to hold the same market share that it had before defendants entered the market. By way of illustration plaintiff estimated that it had lost sales of $18,490,000 over the period from 1962 to 1969. After calculating the difference betwen the sales volume which could be anticipated on that assumption and the actual sales volume, a profit ratio was then applied so as to arrive at the lost profits.

The second component of the judgment, referred to as the diminution in the value of plaintiff's business as of June, 1969, was intended to reflect the fact that after June, 1969, a number of years would be required for plaintiff to regain its former market position. One of plaintiff's expert witnesses calculated this element of plaintiff's damages by making a comparison between the future sales which could be anticipated with plaintiff's share restored and the sales which could be anticipated without such restoration. A profit ratio was then applied to translate the sales figures into lost profits, and the latter figure was discounted so as to reflect present value. A second expert witness employed a somewhat different method whereby he capitalized the amount of what he determined to be the average annual lost profits prior to 1969.

Defendants contend that the underlying data concerning plaintiff's sales volume is based in part upon a survey which, according to defendants, did not cover a representative sample. Defendants' criticism is blunted, however, by their failure to object to the admission of the exhibits containing the information in question.

Moreover, while defendants advert to the substantial difference in amount between the judgment given on the first trial and that given in the second, defendants' brief fails to charge that the latter was excessive. The amount of the second judgment appears to fall within the range of estimates given by plaintiff's expert witnesses on loss of profits and diminution of value of plaintiff's business. The difference, in any event, is explainable in part by the lapse of time between the first and second trials. Judgment in the first was entered in December, 1966. The hearing of evidence in the second did not commence until April, 1971. Some evidence regarding the extent of plaintiff's damages which was available for the second trial would not have been available in 1965 and 1966.

Defendants also argue that it was improper to award damages for lost profits attributable to a period following the expiration of the covenants not to compete. We have held, however, that defendants' liability is not measured exclusively by these covenants but rests as well on a breach of fiduciary obligations.

In their appeal defendants also challenge the judgment of $170,835 against Stoner individually. That judgment represented the forfeiture of his salary for three years and five months, the period during which the court found that he had breached his fiduciary duties, starting with the loans to Phillips in 1961 and ending with his guarantee of the bank loan to Phillips in 1964.

Defendants' initial contention is that plaintiff's sole remedy against Stoner was to terminate its contract with him, and that in any event plaintiff waived any right to

other relief which it may have had by failing to discharge him. The appellate court in each of its opinions rejected this line of argument, and we do so as well. The insertion in an employment contract of an express provision for termination is not to be looked upon as a relinquishment of rights which plaintiff would have had without that provision. Nor do we see in what manner the failure of plaintiff to bring suit against defendants earlier than it did barred it from recovering damages, even assuming, contrary to what the evidence shows, that plaintiff was aware of defendants' breach.

Defendants next contend that the forfeiture of Stoner's salary in addition to the allowance of damages for plaintiff's lost profits constitutes an improper double recovery. The judgment against Stoner did not represent a forfeiture of his total salary but only for the period of time beginning with the breach of his duty of loyalty. In this respect the case at hand differs from *Ely* v. *King-Richardson Co.* (1914), 265 Ill. 148, where employees who had been discharged for setting up a competitive business were held to be entitled to moneys owed them for a period antedating that action. It borders upon the frivolous for defendants to claim a right to retain the compensation which the judgment restored to plaintiff.

Defendants' final point is that the trial court "had no jurisdiction to enter two final judgment against Harry Stoner on one count." We have examined the brief filed by defendants in the appellate court on this appeal, and we are in some doubt as to whether the question now under discussion was raised before that court. We are, moreover, unable to discern the meaning of this assertion or to perceive any manner in which defendants have been prejudiced by the fact that two separate judgments were entered. As we have stated, the smaller judgment, entered only against Stoner individually, was designed to recover the salary paid him by plaintiff. The larger judgment was designed to compensate plaintiff for its lost profits. That judgment

was entered against both defendants because each had participated in the pattern of wrongful acts on which this suit was founded. Stoner Investments, Inc., is wholly owned by Stoner and his wife, and we de not understand that satisfaction of the judgment for $7,345,000 would require a separate payment of this amount by each defendant.

For the reasons dicussed in this opinion the judgment of the appellate court is reversed and that of the circuit court is affirmed.

Appellate court reversed,
circuit court affirmed.

AMENDED AND SUPPLEMENTAL COMPLAINT

[CAPTION OMITTED IN PRINTING]

(Filed January 2, 1975)

Plaintiffs, by their attorneys, BARNABAS F. SEARS and JAMES E. S. BAKER, complaining of the Defendant, THE VENDO COMPANY, allege as follows:

COUNT I.

(Federal Antitrust Law)

1. These proceedings are instituted and the jurisdiction of this Court is based upon Sections 4 and 16 of the Clayton Act (15 U.S.C. 15 and 26) and Section 1337 of the Judicial Code (28 U.S.C. 1337) against Defendant, THE VENDO COMPANY (hereinafter called "VENDO"), for violations as hereinafter alleged of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2).

2. VENDO transacts business within the Northern District of Illinois.

3. Plaintiff, HARRY B. STONER (hereinafter called "STONER"), is an individual, resident of Aurora, Illinois. Prior to 1959, he had been active in the business of designing and manufacturing vending machines in Aurora, Illinois for more than 25 years. In 1959, he was the President and one of the principal owners of STONER MFG. CORP. (hereinafter called "STONER MFG."), which company was an Illinois corporation engaged in the manufacture and sale of vending machines. In 1959, said STONER MFG. sold substantially all of its operating assets to VENDO pursuant to a contract of sale, a true and correct copy of which is attached hereto as Exhibit A.

4. Plaintiff, STONER INVESTMENTS, INC., a Delaware corporation, with its principal place of business in Aurora, Illinois, (hereinafter called "STONER INVESTMENTS"), is a successor to the Illinois corporation, which prior to May, 1959, was named STONER MFG. CORP. Upon the sale of its

principal assets to VENDO, in 1959, STONER MFG. CORP. changed its name to STONER INVESTMENTS, INC. In July, 1964, STONER INVESTMENTS purchased approximately 25% of the common stock of LEKTRO-VEND CORP., a Delaware corporation (hereinafter called "LEKTRO-VEND"). During 1965-1974, STONER INVESTMENTS loaned to LEKTRO-VEND in excess of $1,742,000. In 1970, $1,162,000 of these advances were converted from loans to common stock and 58,100 additional shares of common stock of LEKTRO-VEND were issued to STONER INVESTMENTS therefor. As of December 30, 1974, STONER INVESTMENTS owns 63,900 shares of common stock of LEKTRO-VEND, which constitutes 61% of the equity and 78.57% of the voting power of LEKTRO-VEND. STONER INVESTMENTS also owns demand notes of LEKTRO-VEND in the amount of $580,000.

5. Plaintiff, LEKTRO-VEND, is and since September 1, 1963, has been a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Aurora, Illinois. This business was originally started as a sole proprietorship under the name and style R. W. PHILLIPS COMPANY in November, 1960 and later did business under the name and style LEKTRO-VEND MANUFACTURING COMPANY. Prior to incorporation the business was primarily that of research and design in the vending machine business. In and prior to November, 1962, as a result of extensive research, a new, novel and improved vending machine (more particularly described in paragraph 18 hereof) was designed and developed by R. W. PHILLIPS. LEKTRO-VEND became the owner thereof upon its incorporation. LEKTRO-VEND has been engaged to the extent possible, by reason of VENDO's harassment activities hereinafter alleged, in the continued improvement of its new machine and in the design, development, manufacture and sale of automatic merchandising equipment (vending machines), particularly vending machines for candy, cookies and crackers, packaged gum, pastry, potato chips, pretzels and other multi-purpose food vending equipment. It has also developed and is selling a coffee vending machine utilizing

freeze-dried coffee. LEKTRO-VEND sells its machines in interstate commerce, in competition with VENDO.

6. Defendant, VENDO, is a Missouri corporation with its principal place of business in Kansas City, Missouri. It proclaims itself to be and it is the world's largest manufacturer of automatic merchandising equipment (vending machines). VENDO has manufacturing plants in Kansas City, Missouri, Aurora, Illinois, Pinedale, California and Westbury, New York. VENDO has subsidiaries or affiliates in Mexico, Germany, Japan, Australia, Italy, France, Canada and Belgium. VENDO sells such machines so produced in all 50 states and in more than 60 countries and territories. VENDO maintains offices for such sales in Los Angeles, California, Dallas, Texas, Chicago, Illinois, Cleveland, Ohio, Atlanta, Georgia, Hasbrouch Heights, New Jersey, Toronto, Ontario, Duesseldorf, West Germany, Paris, France, Milan, Italy, Sydney, Australia, Brussels, Belgium, and Johannesburg, South Africa. VENDO has regional managers or representatives in California, Colorado, Florida, Georgia, Illinois, Indiana, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin and San Juan, Puerto Rico.

7. At the time of the filing of the original Complaint herein, VENDO had control of over 40% of the entire business of the manufacture of vending machines in the United States. VENDO then had control of between 50% and 100% of the manufacture of vending machines for the vending of candy, pastry, milk and ice cream, and of multi-purpose (refrigerated and non-refrigerated) food vending machines, which is the field in which LEKTRO-VEND has attempted to compete with VENDO. In 1964, VENDO's sales of vending machines for hot and cold food, coffee, milk, ice cream, candy, pastries and cigarettes exceeded $28,000,000, an increase of approximately 15% over the preceding year and more than double the comparable sales for the year 1959. In the year 1964, the sales of the above named products

accounted for in excess of 40% of the total sales of VENDO. In 1964, sales of vending machines for confections and foods of all manufacturing companies totaled approximately $31,915,000. As of December 30, 1974, VENDO's market share of the vending machine manufacturing business of the United States was in excess of 30%. Its sales over the last several years have been in excess of $100,000,000 a year.

8. VENDO has monopolized, and attempted to monopolize, the trade and commerce in the State of Illinois, among the several states and with foreign countries in the business of manufacturing and selling vending machines, and has acquired as the result of its unlawful activities, control over so substantial a share of such trade and commerce as to obtain the power to remove or to exclude competitors from the field. VENDO now possesses such power and has possessed such power for a number of years and has demonstrated its intent to remove or exclude competitors from the vending machine manufacturing business. For purposes of this Amended and Supplemental Complaint, the relevant geographic markets or parts of commerce and trade are:

(1) the entire United States;

(2) each of the six regional sales markets of VENDO, which are its Eastern, Southern, Central, Midwestern, Southwestern and Western divisions;

(3) the State of Illinois, where the STONER MFG. division is located.

For the purposes of this Amended and Supplemental Complaint, the relevant products or parts of trade or commerce are:

(1) vending machines for food, beverages and confections;

(2) vending machines for food and confections;

(3) vending machines for candy bars, excluding bulk vending equipment;

(4) vending machines for packaged chewing gum;

(5) vending machines for pastries, such as vending machines for sweet rolls, cupcakes and doughnuts;

(6) vending machines for hot canned foods and soups;

(7) vending machines for snacks, excluding candy bar venders, such as machines for sales of cookies, crackers, biscuits, popcorn, ice cream, potato chips, pretzels, corn chips, or cheese sticks;

(8) multi-purpose, refrigerated and non-refrigerated vending machines for food, such as machines for sale of sandwiches and salads;

(9) vending machines for confections, such as machines for candy, gum, mints, potato chips, corn chips, cheese sticks, pastries, sweet rolls, pies, cupcakes and doughnuts;

(10) vending machines for coffee;

(11) vending machines for soft drinks;

(12) other vending machines for beverages, such as machines for sale of milk, hot chocolate and/or hot soup (except canned soup) not sold in a combination machine with coffee.

9. VENDO has engaged in numerous overt acts in an effort to establish, maintain, use and increase its monopoly power over the trade and commerce of vending machines in the State of Illinois, the several states and foreign countries. The intent of these acts is and has been to eliminate the competition of LEKTRO-VEND and other competitors of VENDO and to deter potential competitors from entering the field. These overt acts are alleged in succeeding paragraphs of this Amended and Supplemental Complaint.

10. On or about September 18, 1956, pursuant to its plan of monopolization, VENDO acquired all the outstanding

capital stock, assets and business of VENDORLATOR MANUFACTURING COMPANY, a California corporation, including its patents and good will, in exchange for 267,464 shares of common stock of VENDO. Prior to the said acquisition, VENDO and the VENDORLATOR MANUFACTURING COMPANY were competitors in the production and sale of coin operated vending machines built to dispense bottled soft drinks in the United States. VENDO is, and prior to the said acquisition was, the largest manufacturer of coin operated vending machines built to dispense bottled soft drinks in the United States. The combined sales of VENDO and the VENDORLATOR MANUFACTURING COMPANY from 1955 to the presented have accounted for and now account for in excess of 40% of the market involved. The VENDORLATOR MANUFACTURING COMPANY is now a division of VENDO. In 1964 the sales of beverage vending machines by VENDO exceeded $28,000,000. The above alleged acts of VENDO demonstrate an intent to monopolize the vending machine manufacturing business.

11. Pursuant to its plan of monopolization, VENDO acquired, beginning in 1959, COIN ACCEPTORS, INC., a Missouri corporation, which acquisition made it independent of other sources for its necessary supply of slug rejectors, a device used in all, or substantially all, coin operated machines, to detect, separate and reject spurious coins and accept legitimate coins. VENDO now has the capacity to manufacture all of its own slug rejectors and controls over 40% of the production of slug rejectors in the vending machine industry.

12. On or about April 3, 1959, pursuant to its plan of monopolization, VENDO acquired substantially all of the assets of the STONER MFG. The facilities of STONER MFG. are now operated as a division of VENDO. Prior to the acquisition, STONER MFG. was the leading manufacturer of vending machines for the sale of candy, producing and selling approximately 70% of such machines in the United States. VENDO's purpose in the acquisition was to further

its plan to monopolize the vending machine manufacturing business by adding a candy vending machine to its vending machine line, which, until the time of such acquisition, did not include a candy vending machine, and removing STONER MFG. as a competitor. STONER MFG. division of VENDO has continued to manufacture such machines. Largely as a result of these monopolistic activities, VENDO, during the years 1962 to date, maintained control of between 20% to 40% of the manufacture of vending machines for vending of candy, pastry, milk and ice cream and of multi-purpose (refrigerated and non-refrigerated) food vending machines, which is the field in which LEKTRO-VEND has attempted to compete with VENDO.

13. As a condition of its acquisition of substantially all the assets of STONER MFG., VENDO exacted from STONER INVESTMENTS a covenant that STONER INVESTMENTS would not directly or indirectly compete with VENDO in the United States or any foreign country in which VENDO or any affiliate or subsidiary was operating for a period of 10 years from the date of closing. The full text of the non-competition covenant is set forth in Section 15 of the Agreement of Sale (Exhibit A hereto). The said non-competition covenant constitutes an unreasonable restraint of trade, in and of itself, and, in the circumstances in which it was exacted, it constituted an independent violation of Section 1 of the Sherman Act (15 U.S.C. 1). It bore no reasonable relation to the assets sold or the protection of the good will of STONER MFG. which was transferred to VENDO in connection with the acquisition. Nor was said non-competition covenant ancillary to any other legitimate business purpose of VENDO. Its purpose and effect was rather to assure the elimination of STONER INVESTMENTS from competition with VENDO, without regard to the limited nature of the transaction between the parties. The making, entering into and exaction of said non-competition covenant is an overt act of VENDO in monopolization and constitutes an attempt to monopolize the trade or commerce among the several states and foreign countries in the manufacture of such vending machines.

14. On or about June 1, 1959, a contract was executed between HARRY B. STONER and VENDO. The contract purported to employ STONER for a period of five years at a salary of $50,000 per year. VENDO exacted from STONER a covenant that for a period of five years after the termination of the purported employment, STONER would not enter into or engage directly or indirectly in the vending machine manufacturing business in any of the territories in which VENDO or its subsidiaries or affiliates was conducting business or in which STONER knew VENDO may in the future conduct business. Section 5 of the contract, attached hereto as Exhibit B, contains the non-competition provision. The said non-competition covenant is an unreasonable restraint of trade in that it is not reasonably limited as to time or geographic extent. The said non-competition covenant was not designed to protect VENDO's trade secrets or its good will. Both the contract of employment itself, and the covenant not to compete, which VENDO exacted from STONER in connection therewith, in and of themselves, and in the circumstances in which they were executed, constituted independent violations of Section 1 of the Sherman Act (15 U.S.C. 1). They bore no reasonable relation to any of VENDO's legitimate business interests. Their purpose and effect was rather to eliminate STONER from competition with VENDO in any part of its worldwide markets.

15. In reality, the said purported employment and subsequent election of STONER as a director of VENDO and as an officer of the STONER MFG. division, as well as the non-competition covenant, were devices of VENDO to prevent STONER from engaging in competition with the defendant, and for no other reason. During the term of such purported employment, STONER was neither assigned nor permitted to perform any duties or responsibilities of an executive or advisory nature. He was informed that his employment by VENDO was a means or device to put him "on the shelf" and that he should function solely as a "senior citizen." In particular, during the term of said purported employment contract STONER was never assigned to or permitted

to meet with VENDO's Product Planning Committee. He did not learn and was not permitted to learn any trade secrets, know-how or other details of the business which would be of any value to a competitor or in the operation of a competitive business. In March, 1964, STONER was not re-elected as a director of VENDO and the employment relationship was terminated on June 1, 1964. The said non-competition covenant constituted an unreasonable restraint of trade, and the making and entering into and exaction of the non-competition covenant is an overt act of VENDO in monopolization and constitutes an attempt to monopolize the trade or commerce in the State of Illinois, among the several states and with foreign countries in the manufacture of vending machines, particularly food vending equipment.

16. In the period immediately preceding the negotiations for the sale of STONER MFG., STONER was seriously ill and unable to participate actively in the business. In order to assure continued success of the business and to protect the interests of his family and other shareholders of STONER MFG., it was necessary for him to sell the assets of STONER MFG. Because of the compelling necessity to STONER of completing the sale, STONER and STONER MFG. were forced to accede to VENDO's unreasonable demand for broad anti-competitive covenants.

17. Representations were made to STONER after said employment contract was executed assuring him that VENDO would not attempt to prevent him from entering into a competitive business, which representations were false and were calculated to conceal VENDO's true intent from STONER and others. Said representations were relied upon by STONER. STONER, in or about December, 1962, and on other occasions, requested VENDO to release him from the illegal covenant not to compete, which release was refused by VENDO. On each such occasion, STONER informed VENDO that said covenant not to compete was invalid and unenforceable. Non-competition agreements worldwide in geographic scope and for extended periods of time are and have been weapons in VENDO's arsenal of power and have been used to limit and eliminate competition and to extend and perpetuate its monopoly.

18. During the term of STONER's purported employment by VENDO, beginning January, 1961, STONER INVESTMENTS made loans to R. W. PHILLIPS which were used by R. W. PHILLIPS to finance the research and development of a first-in, first-out electrically operated vending machine ("FIFO") of novel design. A prototype of this FIFO vending machine became known as the "Lektro-Vend Machine" at the October, 1962 exhibit of the National Automatic Merchandising Association in San Francisco, California and received much favorable comment. PHILLIPS then considered entering into the manufacture and sale of vending machines rather than selling the design to some vending machine manufacturer. He invited STONER to join him in this enterprise if he could secure his release from VENDO. After the five-year term of STONER's employment contract with VENDO ended June 1, 1964, STONER has, without compensation, devoted some time and effort to assist LEKTRO-VEND financially and particularly in the area of research and development of vending machines designed for use in the vending of candy bars, mints and gum, which LEKTRO-VEND has sought to market in the State of Illinois and elsewhere under its name. STONER INVESTMENTS purchased approximately 25% of the common stock of LEKTRO-VEND in July, 1964. STONER INVESTMENTS has continued, since June, 1964, to advance monies to LEKTRO-VEND and now owns 78.57% of the common stock of LEKTRO-VEND.

19. Pursuant to its plan of monopolization, on or about July 31, 1964, VENDO's wholly owned subsidiary, VENDO MANUFACTURING CORP. of New York, a New York corporation (organized on July 30, 1964), acquired all of the vending machine manufacturing assets and patents of CONTINENTAL VENDING MACHINE CORP., an Indiana corporation, and of CONTINENTAL APCO, INC., a New York corporation,

a wholly owned subsidiary of CONTINENTAL VENDING MACHINE CORP. The manufacturing facilities of the CONTINENTAL VENDING MACHINE CORP. were at the time of purchase sufficient to assemble various types of automatic coin operated vending machines which dispense soft drinks, coffee, cigarettes, and ice cream. The trustees in bankruptcy from whom such assets were purchased were prepared to sell the assets to the KELSEY-HAYES CORP., a Delaware corporation, which is a manufacturer of automobile and aircraft parts. In order to prevent another corporation from entering into competition with it, VENDO, to extend its monopoly and eliminate competition, outbid the prospective purchaser. Subsequent to the acquisition of the CONTINENTAL APCO assets, the plants acquired were closed, and the manufacture and sale of the vending machines previously made by CONTINENTAL APCO were discontinued, thereby eliminating CONTINENTAL APCO as a competitor and preventing KELSEY-HAYES CORP. from entering into and becoming a competitor of VENDO in the manufacture and sale of vending machines.

20. Pursuant to its plant of monopolization, on or about August 10, 1965, VENDO filed suit in the Circuit Court for the Sixteenth Judicial Circuit of Illinois against STONER and STONER INVESTMENTS. The full text of the original complaint in said suit is attached hereto as Exhibit C. The complaint alleged that STONER had breached his agreement not to compete of June 1, 1959 and that STONER INVESTMENTS had breached its agreement of April 3, 1959, both of which sought to eliminate competition for 10 years throughout the world. As has been previously alleged, the worldwide non-competition covenants contained in the two contracts are illegal and in violation of the antitrust laws of the United States, particularly Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2). The actual but intentionally concealed purpose of said lawsuit and VENDO's subsequent conduct in connection with said lawsuit was to eliminate the competition of LEKTRO-VEND, as well as the competition of STONER and STONER INVESTMENTS, by unlawfully

harassing STONER and STONER INVESTMENTS, the main source of financial support of LEKTRO-VEND. VENDO knew full well that by unlawfully harassing STONER and STONER INVESTMENTS it would succeed in financially destroying LEKTRO-VEND. The threats to enforce such non-competition covenants, the bringing of a suit in an attempt to enforce the illegal covenants and VENDO's conduct in connection with such suit, are overt acts of VENDO in monopolization and constitute an attempt to monopolize the trade or commerce in the State of Illinois, among the several states and foreign countries in the manufacture of such vending machines. Specifically, these overt acts of VENDO include, but are not limited to, the following:

(a) The designed and wilful bringing of the lawsuit against STONER and STONER INVESTMENTS in spite of the fact that VENDO knew at the time it brought such suit that: 1) The noncompetition covenants were illegal and 2) neither STONER nor STONER INVESTMENTS breached their respective illegal, non-competition covenants. The purpose of bringing this suit was to destroy its competitor LEKTRO-VEND. VENDO concealed this purpose by designedly failing to join LEKTRO-VEND or R. W. PHILLIPS in its suit.

(b) VENDO's designed and wilful amendment of its complaint on January 28, 1966 at the first trial of its case, alleging that STONER and STONER INVESTMENTS stole a valuable trade secret (design concept of vending machines), notwithstanding VENDO know both at the time it filed its lawsuit and at the time it amended its complaint that neither STONER nor STONER INVESTMENTS could possibly have stolen a trade secret. A copy of VENDO's Amendment to Complaint is attached hereto as Exhibit D. Said Amendment was filed notwithstanding the fact that at the August 3, 1959 VENDO products planning meeting, at which the FIFO machine of VENDO design was discussed. STONER was only present from somewhere between thirty (30) seconds

and three (3) minutes, with the meeting being suspended during his brief appearance, while VENDO did not sue R. W. PHILLIPS, then an employee of VENDO, and who was a member of the committee and was present during the entire meeting and actually discussed the possibility of whether a FIFO machine of VENDO design could be produced by the STONER MFG. plant. The $1,100,000 judgment that VENDO recovered against STONER INVESTMENTS at the first trial, based solely on its theory of a theft of a trade secret, was set aside by the Appellate Court of Illinois on January 20, 1969, the Court holding that VENDO did not have a trade secret and that the LEKTRO-VEND machine was a product of the ingenuity of PHILLIPS and not based on ideas acquired from VENDO. The Court remanded the cause for the assessment of damages based on a theory of breach of the illegal covenants and damages therefrom through the competition of LEKTRO-VEND. A copy of the Appellate Court's opinion is attached hereto as Exhibit E.

(c) Notwithstanding that its Petition for Leave to Appeal from the said Appellate Court's judgment of January 20, 1969 had been denied by the Supreme Court of Illinois, and the law of the case on remand thereby fixed and binding upon the parties, VENDO blatantly ignored said mandate by presenting on remand, over STONER's and STONER INVESTMENTS' constant objections, a new theory outside the scope of the pleadings, namely what VENDO lost by way of sales by its failure to have a FIFO machine, which resulted from the fault of STONER. This new theory was presented even though VENDO knew that STONER was not responsible for VENDO's not having a FIFO machine. The trial court on remand entered judgment against STONER and STONER INVESTMENTS of $7,345,500 on VENDO's new theory that its loss from failure to have a FIFO machine was the fault of STONER, which theory was outside the mandate

of the Appellate Court. On the second trial, the Appellate Court of Illinois, on May 29, 1973, reversed this judgment, specifically holding that the evidence adduced by VENDO was not based on defendants' wrongful competition and therefore did not conform to the Appellate Court's first decision and mandate or the pleadings and that neither the evidence at the first trial nor the evidence on remand established that STONER was responsible for VENDO not having a FIFO machine. A copy of this second opinion by the Appellate Court is attached hereto as Exhibit F. The Illinois Supreme Court granted leave to appeal and reversed the Appellate Court and affirmed the award of damages in the amount of $7,345,000 against STONER and STONER INVESTMENTS, basing its affirmance on its finding that STONER had breached his fiduciary duty as an officer or director of VENDO, a theory outside the pleadings in the state court action, and the Appellate Court's mandate which was binding on the parties and the trial court on remand. A copy of the opinion filed by the Illinois Supreme Court on November 27, 1974 is attached hereto as Exhibit G.

(d) VENDO's misrepresentations of the record before the Appellate Court of Illinois and the Illinois Supreme Court with respect to STONER's and STONER INVESTMENTS' Fifth Separate Defense and their Counterclaim, which alleged that VENDO's restrictive covenants, its suits to enforce them, and certain other practices and activities of VENDO were violative of the Illinois Antitrust Act, which became effective July 21, 1965. On April 16, 1966 the trial court ordered these defenses and counterclaim stricken and dismissed. The Appellate Court of Illinois in its first opinion (Exhibit E) stated that these defenses and counterclaim were rendered inapplicable under the doctrine of federal preemption because VENDO's business was interstate, and thus that it was not necessary to consider the merits of the defenses and counterclaim. The Appellate

Court also stated, contrary to the record, that STONER and STONER INVESTMENTS did not plead or argue that the commerce involved was anything but interstate. VENDO well knew that the counterclaim alleged wrongful acts of VENDO in Illinois intrastate commerce and remained silent when STONER and STONER INVESTMENTS' Petition for Rehearing unsuccessfully called that to the Appellate Court's attention.

(e) VENDO misrepresented the record before the Supreme Court of Illinois by arguing that the Appellate Court in its first opinion (Exhibit E) did not actually decide the issue of the applicability of the Illinois Antitrust Act on the grounds of preemption by the Federal Antitrust Laws because of the parties' interstate activities, but had decided that STONER and STONER INVESTMENTS had insufficiently alleged the impact of VENDO's illegal and monopolistic acts on intrastate commerce. The result was that the Illinois Supreme Court in its opinion of November 27, 1974 (Exhibit G, 309-10) erroneously stated that there had been some dispute between the parties as to whether "the first opinion of the Appellate Court was based on the theory that the Illinois act was preempted by the Federal antitrust law or upon the inapplicability of the Illinois act because of the absence of a substantial impact in Illinois arising out of the acts complained of" by STONER and STONER INVESTMENTS.

(f) VENDO's mispresentation of the record before the Supreme Court by again arguing that the Illinois Antitrust Act could not be applied retroactively, knowing that various of its illegal and monopolistic acts in Illinois occurred subsequent to July 21, 1965, the effective date of the Act, and that the Counterclaim so alleged. The result was that the Illinois Supreme Court decided that the Illinois antitrust act was not retroactively applicable and could not form "the basis of a counterclaim" (Exhibit G, 310), even as to acts committed by VENDO *after* the passage of the 1965 Act.

21. Pursuant to its plan of monopolization in the course of the prosecution of the state court litigation, VENDO has insisted upon oppressive terms as a condition for the stay of execution pending appeal, which has resulted in the tying up of funds of STONER and STONER INVESTMENTS which would have otherwise been available for the financial support of LEKTRO-VEND and has made a number of efforts to acquire ownership of LEKTRO-VEND. The effect of the State court litigation and its conduct by VENDO has been to harass and impede the competition of LEKTRO-VEND and to eliminate or suppress its competition and further VENDO's unlawful plan of monopolization.

22. Pursuant to its plan of monopolization, VENDO has prematurely commenced efforts to collect its State court judgment. VENDO well knows that STONER and STONER INVESTMENTS filed a Petition for Rehearing in the Illinois Supreme Court alleging that the judgment of that court denied it procedural and substantive due process, contrary to the Fourteenth Amendment of the United States, as more particularly set forth in said Petition for Rehearing; that said Petition for Rehearing was denied on November 27, 1974; and that STONER and STONER INVESTMENTS intend to and will file in the United States Supreme Court a petition for a writ of certiorari to the Illinois Supreme Court within the time permitted by law. On December 14, 1971, as a condition of staying enforcement of the State court judgment, among other things, a certain Escrow Trust Agreement was executed by the Chicago Title and Trust Company, as escrow trustee, and STONER INVESTMENTS, and VENDO, a copy of which is attached as Exhibit H, the conditions of which have been fully performed by STONER INVESTMENTS. Said Escrow Trust Agreement provides "all proceedings regarding said judgment and enforcement thereof shall be stayed until this escrow trust is terminated," which under the terms of paragraph 12 thereof is to occur "after the complete and final determination of said appeal." Notwithstanding, upon the issuance, on December

5, 1974, of the mandates of the Supreme Court of Illinois, affirming the state court judgments, VENDO, on December 9, 1974, demanded that Chicago Title and Trust Company immediately pay to it the monies in said escrow, aggregating approximately $650,000. Notwithstanding that VENDO was advised by the Chicago Title and Trust Company on December 18, 1974 that there had been no complete and final determination of said appeal, VENDO instituted supplementary proceedings in the Circuit Court for the Sixteenth Judicial Circuit of Illinois, causing a Citation to Discover Assets to issue on December 20, 1974 directed to the Chicago Title and Trust Company, which also called for the production of documents, including any pertaining to Stoner Shopping Center, Inc. Such premature enforcement efforts are intended as further harassment of STONER, STONER INVESTMENTS and LEKTRO-VEND. VENDO has further attempted to harass the plaintiffs by efforts on or about December 20, 1974 to impede the making of a loan and a mortgage of certain property owned by Stoner Shopping Center, Inc., a corporation not a party to the litigation nor owned in whole or in part by STONER or STONER INVESTMENTS.

23. Pursuant to its plan of monopolization, VENDO's sales representatives and employees have spread malicious rumors to the effect that LEKTRO-VEND was in severe financial difficulties, was unable to perform its contracts for the manufacture and sale of vending machines, was unable to service such machines after delivery and was actually insolvent and on the verge of bankruptcy. LEKTRO-VEND's sales of vending machines substantially decreased and its growth was impeded as a result of these rumors. VENDO has used publicity about developments in the state court litigation favorable to it to disparage and harass LEKTRO-VEND.

24. Pursuant to its plan of monopolization, VENDO has threatened to sue and has sued competitors for alleged violations of anti-competitive contracts. These threats and suits have been without merit and solely for the purpose of harassment. The purpose and intent of the threats to

initiate expensive and time-consuming litigation with regard to certain narrow and weak covenants is and has been to eliminate competition and drive competitors out of business.

25. Largely as a result of VENDO's unlawful monopolistic activities and practices as previously alleged, its net profit has increased from approximately $840,000 in 1955 to $3,500,000 in 1964, to $6,500,000 in 1966. During the same period, VENDO's net sales increased from approximately $20,800,000 in 1955 to $63,540,000 in 1964, and its total assets increased from approximately $10,950,000 to $50,460,000. During the first six months of 1965, the total sales of VENDO were $38,869,153, a 35% increase over the same six month period for the prior year. During the first six months of 1965, earnings were $3,456,150, an increase of 66% over the same period from the prior year. Sales made by the CONTINENTAL VENDING MACHINE CORP. division made a substantial contribution to such sales and earnings. By 1971 VENDO's sales had increased to the point where its sales for 1971 were $91,900,000, for 1972 were $110,800,000 and for 1973 were $113,400,000.

26. As a result of VENDO's attempts to monopolize the manufacture and sale of vending machines as alleged, VENDO has made it substantially more difficult to enter the vending machine manufacturing business and competition has substantially lessened. In 1958, there were approximately 120 vending machine manufacturers. In 1963, this was substantially reduced to 76 such manufacturers, and in 1964, the number of manufacturers had been further reduced to 66. Of these 66 companies 47 had sales in excess of $100,000. In 1964, approximately 31 companies manufactured vending machines for confections and food, but only 16 of them had sales in excess of $100,000. In 1964, twelve companies manufactured vending machines for candy bars; eight of these had sales in excess of $100,000. By 1974 there were even fewer manufacturers of vending machines for candy sales left in the United States.

27. As a result of the prosecution of the action in the Sixteenth Judicial Circuit of Illinois and of the other acts as alleged, the plaintiffs, STONER and STONER INVESTMENTS, have not been able to participate to the fullest and have been unlawfully prevented from constructively utilizing their knowledge and abilities in the industry, to the damage of the industry as a whole, the consuming public, LEKTRO-VEND, and themselves. The growth of LEKTRO-VEND as a competitor in the candy vending machine industry and as a competitor of VENDO has been seriously impaired. LEKTRO-VEND has been seriously injured as a proximate result of VENDO's unlawful monopolistic practices, activities and its exercise and attempted exercise of its monopoly power. The enforcement or attempted enforcement of the judgments in said action threatens to wipe out STONER and STONER INVESTMENTS as a source of financial support for LEKTRO-VEND and to deliver control of LEKTRO-VEND into the hands of VENDO, its competitor.

28. As a direct consequence of VENDO's actions as alleged, and of the pendency of the Illinois action, for the defense of which STONER has been forced, and will in the future be forced, to make substantial expenditures, STONER has sustained damages of in excess of $500,000 to date, in addition to the potential liability upon the state court judgments of $170,835 against STONER individually and $7,345,500 against STONER and STONER INVESTMENTS.

29. STONER INVESTMENTS has been unable, because of VENDO's actions as alleged, to invest in or otherwise participate fully in the business of the manufacture and sale of vending machines. Had it been free to participate in such business and to invest funds therein, it could have realized a profit from such participation and investment of in excess of $200,000 per year. Because of the need to devote large amounts of executive time to the defense of said action and because of the terms of the appeal bonds, security agreements and escrow trust agreements exacted by VENDO as a condition to a stay of judgment pending appeal,

STONER INVESTMENTS has been unable to participate fully in its major enterprise of land development. As a proximate result thereof, and as a direct result of the pendency of the Illinois action, for the defense of which it has been forced, and in the future will be forced, to make substantial expenditures of money and utilize the time of its employees, STONER INVESTMENTS has been damaged in an amount in excess of $3,000,000, plus the potential liability upon the judgment of $7,345,500 and costs obtained in said action.

30. As a direct and proximate result of the violations heretofore set forth, LEKTRO-VEND has been substantially injured in its business and property, to-wit: LEKTRO-VEND has been deprived of the services of STONER and the full financial assistance of STONER INVESTMENTS; its sales and profits have been seriously impaired and reduced; it has suffered an immense loss of good will and reputation; and the value of its business has been substantially reduced; all to the damage of LEKTRO-VEND. The precise amount of damage is not presently known to LEKTRO-VEND, but is believed to be in excess of $10,000,000, and is increasing.

31. Plaintiffs, and each of them, allege that the foregoing violations of the antitrust laws by VENDO are presently continuing. VENDO is threatening to collect the state court judgments it has procured, the effect of which will be to render STONER and STONER INVESTMENTS penniless and enable VENDO, by acquisition of control of LEKTRO-VEND, to terminate its operations. Further irreparable loss and damage is threatened to plaintiffs, and each of them, unless VENDO is restrained by this Court from taking any steps to collect its said judgments or to continue its anti-competitive activities directed at LEKTRO-VEND.

WHEREFORE, the Plaintiffs pray the following relief with respect to Count I:

1. That this Court adjudge and decree that the acts of VENDO as hereinabove described have been and continue to

be in violation of the antitrust laws, including Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2).

2. That this Court issue a permanent injunction against VENDO as hereinabove described have been and continue to tices alleged herein.

3. That STONER be awarded damages against VENDO in the amount of $500,000 plus $170,835 plus $7,345,500, a total of $8,016,335, to be trebled to $24,049,005, as provided by law.

4. That STONER INVESTMENTS be awarded damages against VENDO in the amount of $3,000,000 plus $7,345,500, a total of $10,345,500, to be trebled to $31,036,500, as provided by law.

5. That STONER and STONER INVESTMENTS be awarded further damages in the amount of the attorneys' fees and cash disbursements and costs they have incurred in the defense of the state court action, such sum to be trebled as provided by law.

6. That LEKTRO-VEND be awarded damages against VENDO in the amount of $10,000,000 to be trebled to $30,000,000, as provided by law.

7. That Plaintiffs, and each of them, be awarded attorneys' fees, costs and interest, as provided by law.

8. That Plaintiffs, and each of them, have such other, further and different relief as the Court shall deem just.

COUNT II.

(Civil Rights and Due Process)

1. This action arises under the provisions of the Fourteenth Amendment to the Constitution of the United States, and under federal law, particularly Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983. This Court has jurisdiction of this cause under and by virtue of §§1331 and 1343 of the Judicial Code, 28 U.S.C. §§1331, 1343, and the

amount in controversy exceeds the sum or value of $10,000, exclusive of interests and costs.

2. Plaintiff, HARRY B. STONER, (hereinafter called "Stoner"), is an individual, resident of Aurora, Illinois. Prior to 1959, he had been active in the business of designing and manufacturing vending machines in Aurora, Illinois for more than 25 years. In 1959, he was the President and one of the principal owners of STONER MFG. CORP. (hereinafter called "STONER MFG."), which company was an Illinois corporation engaged in the manufacture and sale of vending machines. In 1959, said STONER MFG. sold substantially all of its operating assets to VENDO pursuant to a contract of sale, a true and correct copy of which is attached hereto as Exhibit A.

3. Plaintiff STONER INVESTMENTS, INC., a Delaware corporation with its principal place of business in Aurora, Illinois (hereinafter called "STONER INVESTMENTS"), is a successor to the Illinois corporation, which prior to May, 1959, was named STONER MFG. CORP. Upon the sale of its principal assets to VENDO, in 1959, STONER MFG. CORP. changed its name to STONER INVESTMENTS, INC.

4. Defendant, VENDO, is a Missouri corporation with its principal place of business in Kansas City, Missouri. It proclaims itself to be and it is the world's largest manufacturer of automatic merchandising equipment (vending machines). VENDO transacts business within the Northern District of Illinois.

5. On or about August 10, 1965, VENDO filed suit in the Circuit Court for the Sixteenth Judicial Circuit of Illinois against STONER and STONER INVESTMENTS. The full text of the original complaint in said suit is attached hereto as Exhibit C. The complaint alleged that STONER had breached his agreement not to compete of June 1, 1959 and that STONER INVESTMENTS had breached its agreement of April 3, 1959, both of which sought to eliminate competition for 10 years throughout the world.

6. VENDO amended its complaint on January 28, 1966, alleging that STONER and STONER INVESTMENTS stole a valuable trade secret, (design concept of vending machines), notwithstanding VENDO knew both at the time it filed its lawsuit and at the time it amended its complaint that neither STONER nor STONER INVESTMENTS could possibly have stolen a trade secret. A copy of VENDO's Amendment to Complaint is attached hereto as Exhibit D. Said Amendment was filed notwithstanding the fact that at the August 3, 1959 VENDO products planning meeting, at which the FIFO machine of VENDO design was discussed, STONER was only present from somewhere between thirty (30) seconds and three (3) minutes, with the meeting being suspended during his brief appearance.

7. The $1,100,000 judgment that VENDO recovered against STONER and STONER INVESTMENTS at the first trial, based solely on its theory of a theft of a trade secret, was set aside by the Appellate Court of Illinois on January 20, 1969, the Court holding that VENDO did not have a trade secret and that the LEKTRO-VEND machine was a product of the ingenuity of PHILLIPS and not based on ideas acquired from VENDO. The Court remanded the cause for the assessment of damages based on a theory of breach of the illegal covenants and damages therefrom through the competition of LEKTRO-VEND. A copy of the Appellate Court's opinion is attached hereto as Exhibit E.

8. Notwithstanding that its Petition for Leave to Appeal from the said Appellate Court's judgment of January 20, 1969 had been denied by the Supreme Court of Illinois, and the law of the case on remand hereby fixed and binding upon the parties. VENDO blatantly ignored said mandate by presenting on remand, over STONER's and STONER INVESTMENTS' constant objections, a new theory outside the scope of the pleadings, namely what VENDO lost by way of sales by its failure to have a FIFO machine which resulted from the fault of STONER. This new theory was presented even though VENDO knew that STONER was

not responsible for VENDO's not having a FIFO machine. The trial court on remand entered judgment against STONER and STONER INVESTMENTS of $7,345,500 on VENDO's new theory that its loss from failure to have a FIFO machine was the fault of STONER, which theory was outside the mandate of the Appellate Court and which theory and the damages based thereon were totally without credible and rational evidence in the record to support said judgment.

9. On the second appeal, the Appellate Court of Illinois, on May 29, 1973, reversed this judgment, specifically holding that the evidence adduced by VENDO was not based on defendants' wrongful competition and therefore did not conform to the Appellate Court's first decision and mandate or the pleadings; that neither the evidence at the first trial nor the evidence on remand established that STONER was responsible for VENDO not having a FIFO machine; and that VENDO's survey upon which it based its damages was patently deficient and non-probative. A copy of this second opinion by the Appellate Court is attached hereto as Exhibit F.

10. The Illinois Supreme Court granted leave to appeal and reversed the Appellate Court and affirmed without remanding the judgment of $7,345,000 against STONER and STONER INVESTMENTS. A copy of the opinion filed by the Illinois Supreme Court on November 27, 1974 is attached hereto as Exhibit G. The Court's first opinion was based upon STONER's breach of a fiduciary duty as an officer or director of VENDO amounting to the misappropriation of a corporate opportunity. When defendants STONER and STONER INVESTMENTS on petition for rehearing pointed out that the judgment could not be based upon that theory (which allows recovery only for defendant's gain), the Court then arbitrarily and capriciously denied rehearing, changing its opinion to breach of fiduciary duty generally. Said opinion relating STONER's breach of fiduciary duty to VENDO's failure to have a FIFO is utterly without credible or rational evidence to support it, as is the survey evidence

upon which the claimed damages were based. As to the survey evidence, the Court arbitrarily and capriciously gave it probative force because it was not objected to when such evidence had no probative force and the damage estimates which were based upon said survey were objected to. All such actions were outside the pleadings and contrary to the judgment and mandate of the Appellate Court governing the trial of the case and from which judgment the Supreme Court had denied VENDO leave to appeal.

11. VENDO misrepresented the record before the Appellate Court of Illinois and the Illinois Supreme Court with respect to STONER's and STONER INVESTMENTS' Fifth Separate Defense and their counterclaim which alleged that VENDO's restrictive covenants, its suits to enforce them, and certain other practices and activities of VENDO were violative of the Illinois Antitrust Act, which became effective July 21, 1965. On April 16, 1966 the trial court ordered these defenses and counterclaim stricken and dismissed. The Appellate Court of Illinois in its first opinion (Exhibit E) stated that these defenses and counterclaim were rendered inapplicable under the doctrine of federal preemption because the parties' business was interstate, and thus it was not necessary to consider the merits of the defenses and counterclaim. The Appellate Court also stated, contrary to the record, that STONER and STONER INVESTMENTS did not plead or argue that the commerce involved was anything but interstate. VENDO well knew that the counterclaim alleged wrongful acts of VENDO in Illinois intrastate commerce and remained silent when STONER and STONER INVESTMENTS' Petition for Rehearing unsuccessfully called that to the Appellate Court's attention. VENDO misrepresented the record before the Supreme Court of Illinois by arguing that the Appellate Court in its first opinion (Exhibit E) did not actually decide the issue of the applicability of the Illinois Antitrust Act on the grounds of its preemption by the Federal Antitrust Laws because of the parties' interstate activities but had decided that STONER and STONER INVESTMENTS had insufficiently alleged the impact of VENDO's illegal and monopolistic acts on intrastate commerce. The result was that the Illinois Supreme Court in its opinion of November 27, 1973 (Exhibit G, 309-10) erroneously stated that there had been some dispute between the parties as to whether "the first opinion of the Appellate Court was based on the theory that the Illinois Act was preempted by the Federal antitrust laws or upon the inapplicability of the Illinois Act because of the absence of a substantial impact in Illinois arising out of the acts complained of" by STONER and STONER INVESTMENTS.

VENDO misrepresented the record before the Supreme Court by again arguing that the Illinois Antitrust Act could not be applied retroactively, knowing that various of its illegal and monopolistic acts in Illinois occurred subsequent to July 21, 1965, the effective date of the Act, and that the Counterclaim so alleged. The result was that the Illinois Supreme Court decided that the Illinois Antitrust Act was not retroactively applicable and could not "form the basis of a counterclaim," (Exhibit G, 310), even as to acts committed by VENDO *after* the passage of the 1965 Act.

12. VENDO has prematurely commenced efforts to collect its State court judgment. VENDO well knows that STONER and STONER INVESTMENTS filed a Petition for Rehearing in the Illinois Supreme Court alleging that the judgment of that court denied it procedural and substantive due process, contrary to the Fourteenth Amendment of the United States, as more particularly set forth in said Petition for Rehearing; that said Petition for Rehearing was denied on November 27, 1974; and that STONER and STONER INVESTMENTS intend to and will file in the United States Supreme Court a petition for a writ of certiorari to the Illinois Supreme Court within the time permitted by law.

13. On December 14, 1971, as a condition of staying enforcement of the state court judgment, among other things, a certain Escrow Trust Agreement was executed between the Chicago Title and Trust Company, as escrow trustee, and STONER INVESTMENTS, INC. and THE VENDO COMPANY

a copy of which is attached as Exhibit H. Said Escrow Trust Agreement provides "all proceedings regarding the said judgments and enforcement thereof shall be stayed until this Escrow Trust is terminated," (Paragraph 13) which under the terms of Paragraph 12 thereof is to occur "after the complete and final determination of said appeal."

14. Notwithstanding, upon the issuance on December 5, 1974 of the mandates of the Supreme Court affirming the State Court judgments, VENDO, on December 9, 1974, demanded that Chicago Title and Trust Company immediately pay to it the monies in said escrow, aggregating approximately $650,000 and notwithstanding that VENDO was advised by the Chicago Title and Trust Company on December 18, 1974 that there had been no complete and final determination of said appeal, VENDO instituted supplementary proceedings in the Circut Court for the Sixteenth Judicial Circuit of Illinois, causing a Citation to Discover Assets to issue on December 20, 1974, directed to the Chicago Title and Trust Company, which also called for the production of documents, including any pertaining to Stoner Shopping Center, Inc. On December 31, 1974 VENDO obtained an order upon said Citation, directing the Escrow Trustee to turn over all funds in said Escrow Trust to VENDO.

15. Plaintiffs have been deprived and will be deprived of procedural and substantive due process and equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States, and of their Civil Rights under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 by the actions of VENDO under color of state law in attempting to effect collection of said state court judgments, in that:

a. The judgments entered by the Supreme Court of Illinois, upon a new theory and legal premise (breach of fiduciary duty by appropriation of a corporate opportunities or breach fiduciary duty, generally) which was never pleaded in the lower courts and which was

contrary to the mandate of the Appellate Court and to the law of the case governing the trial court on remand, denied plaintiffs the right to notice and an opportunity to be heard and present their evidence relating thereto, at a meaningful time and in a meaningful manner, with respect to said new matters, upon which said Court affirmed said judgments, contrary to procedural due process of law.

b. The judgments of the Supreme Court of Illinois were in violation of a clear and unambiguous state statute, namely, the Illinois Antitrust Act, and denied plaintiffs a clear and unambiguous remedy provided by said statute. Such judgments were therefore arbitrary and capricious, without warrant in law, and denied plaintiffs substantive due process and equal protection of the laws.

c. The judgment of the Supreme Court reversing the judgment of the Appellate Court, which was based on a finding that STONER was not responsible for VENDO's failure to have FIFO, and its affirmance of the trial court's judgment for $7,345,500 against plaintiffs is totally refuted by the evidence in the record, there being no evidence in the record which rationally supports said Supreme Court judgment. Said judgment is therefore arbitrary and capricious and denies plaintiffs due process.

16. VENDO is threatening to, and unless restrained or enjoined by this Court, will collect the State court judgments it has wrongfully procured in the derogation of plaintiffs' constitutional rights, to the irreparable harm and detriment of plaintiffs.

17. VENDO's conduct and activity was wilful and wanton and in conscious disregard of plaintiffs' constitutional rights.

WHEREFORE, the plaintiffs STONER and STONER INVESTMENTS pray the following relief with respect to Count II:

1. That this Court issue preliminary and permanent injunctions against VENDO restraining it from continuing the unlawful practices alleged herein, including restraining VENDO from enforcing or collecting, or attempting to enforce or collect, the State court judgments.

2. That plaintiffs be awarded damages in the amount of the attorneys' fees and cash disbursements and costs they have incurred in the defense of the State court action.

3. That plaintiffs be awarded punitive damages in an amount of $200,000.

4. That plaintiffs be awarded attorneys' fees, costs and interests for this suit.

5. That plaintiffs have such other and further relief as the Court shall deem just.

LEKTRO-VEND CORP.
HARRY B. STONER and
STONER INVESTMENTS, INC.

By BARNABAS F. SEARS
Barnabas F. Sears

By JAMES E. S. BAKER
James E. S. Baker
Their Attorneys

Of Counsel:

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[CERTIFICATE OF SERVICE
OMITTED IN PRINTING]

Exhibit A To Amended And Supplemental Complaint

AGREEMENT made the 3rd day of April, 1959, by and between STONER MFG. CORP., an Illinois Corporation, having its principal place of business at Aurora, Illinois, (hereinafter referred to as the "Company"), and THE VENDO COMPANY, a Missouri Corporation having its principal place of business at 7400 East Twelfth Street, Kansas City, Missouri, (hereinafter referred to as "Vendo").

• • • • •

SECTION 15. From and after the closing, the Company will not own, directly or indirectly, manage, operate, join, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business engaged in the manufacture and sale of vending machines under any name similar to the Company's present name, and, for a period of ten (10) years after the closing, the Company will not in any manner, directly or indirectly, enter into or engage in the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by the Company. The Company also agrees that during its corporate existence it will, without incurring any financial obligation, cooperate with Vendo to prevent the use by others of the name 'Stoner' and 'Stoner Mfg. Corp.' in connection with any business similar to that now carried on by the Company and also agrees not to disclose to others, or make use of directly or indirectly any formulae or process now owned or used by the Company.

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Exhibit B To Amended And Supplemental Complaint

EMPLOYMENT CONTRACT

AGREEMENT made and entered into this 1st day of June, 1959, by and between the VENDO COMPANY, a Missouri Corporation having its principal place of business in Kansas City, Missouri, hereinafter referred to as the "Company", and HARRY B. STONER, of the City of Aurora, Kane County, Illinois, hereinafter referred to as "Stoner".

WITNESSETH THAT

WHEREAS, Stoner is the President, the principal executive, officer and directing heard of Stoner Mfg. Corp., an Illinois Corporation with its principal office located at 328 Gale Street, Aurora, Kane County, Illinois, and

WHEREAS, the Company and said Stoner Mfg. Corp have heretofore entered into an agreement dated the 3rd day of April, 1959, providing for the sale by Stoner Mfg. Corp. and the purchase by the Company of the major portion of the assets of Stoner Mfg. Corp. all of which said assets are located at Aurora, Illinois, and are proposed to be operated as a manufacturing facility by the Company and

WHEREAS, one of the reasons among others inducing the said Stoner Mfg. Corp. to enter into such agreement aforesaid was the physical condition of said Stoner and

WHEREAS, it has not been determined whether said Aurora, Illinois, facility so purchased shall be operated as a division of the Company or as a separate subsidiary corporation, but in either event the Company desires to employ the services of Stoner in connection with the operation of said Aurora, Illinois, facility and in connection with other operations of the Company and Stoner desires to enter into the employ of the Company,

NOW THEREFORE, in consideration of the premises and in consideration of the mutual covenants and agreements contained herein, the parties hereto do hereby contract and agree as follows:

1. The Company hereby employs Stoner for a period of five (5) years from the date hereof as an officer or in such other executive or advisory capacity with the subsidiary corporation if the Company decides that the Aurora, Illinois, facility shall be operated as a subsidiary corporation.

2. Stoner accepts such employment and agrees to serve as an officer or in such other executive or advisory capacity with the Company or such subsidiary corporation as aforesaid as the Company may request and as Stoner's physical condition will permit for said period of five (5) years and also agrees to serve without additional compensation except the compensation herein provided as a director of the Company or of any of the company's subsidiary corporations as the Company or its stockholders may determine.

3. Stoner shall regulate his own hours of employment and shall determine the amount of time and effort which he shall devote to such service and employment for the Company, it being understood that the value of Stoner's services to the Company are not measured by the amount of time or effort devoted to the business by Stoner but by the value of his advice and counsel in the operation of the Aurora, Illinois, facility, and his know-how, experience and reputation in the vending machine field. In his employment for the Company Stoner shall not be required to move his place of residence from Aurora, Illinois.

4. As compensation for his services during the term of this agreement in whatever capacity rendered the Company shall pay Stoner a salary of Fifty Thou-

sand Dollars ($50,000.00) per year payable in monthly installments.

5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or salesman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter.

6. This agreement shall terminate five (5) years from the date hereof or upon the death of Stoner whichever shall occur sooner. In the event of the death of Stoner during the term hereof the Company shall be obligated to pay to Stoner or to his estate compensation only to the date of his death.

7. The Company shall have the right to terminate this agreement upon thirty days (30) notice in the event of the substantial violation of the terms hereof by Stoner.

8. Stoner may cancel and terminate this agreement at any time on thirty (30) days notice in the event he

shall feel that he is not physically able to perform his duties hereunder.

9. In the event of the termination as provided in paragraph 7 and 8 above, the Company shall be obligated to pay Stoner compensation only to such date of termination.

10. Any notice required to be given pursuant to the provisions of this agreement shall be in writing and by registered mail and shall be mailed to the parties at the following addresses:

The Company, 7400 East 12th Street, Kansas City, 26, Missouri

Stoner, 1530 Garfield, Aurora, Illinois

provided, however, that either of the parties hereto may from time to time change such mailing addresses by notice to the other party.

11. It is understood that this agreement may be assigned by the Company to any subsidiary, parent, successor or any affiliated person, firm or corporation and in such event Stoner's employment shall continue to be subject to each and all of the terms and conditions of this agreement and this agreement shall be considered an obligation and liability of the person, firm or corporation to whom this agreement may be so assigned but the Company shall nevertheless remain liable as a principal under this agreement.

12. This agreement may be amended at any time by agreement in writing executed by the parties hereto.

13. This agreement shall be binding upon and shall inure to the benefit of the parties hereto their respective heirs, legal representatives, successors and assigns including transferees of the assets of the Company.

IN WITNESS WHEREOF the Company has caused this agreement to be executed in its corporate name and its corporate seal to be hereunto affixed and attested and Stoner has hereunto set his hand and seal all as of the day and year first above written.

THE VENDO COMPANY
A Missouri Corporation

By /s/ ROBERT W. WAGSTAFF
Vice Chairman of the Board
and Executive Vice President

ATTEST:

/s/ GILBERT CARBAUGH II
Assistant Secretary

/s/ HARRY B. STONER
Harry B. Stoner
(SEAL)

Exhibit C to Amended and Supplemental Complaint

[Complaint in The Vendo Co. v. Stoner, et al. (state court case). This document is reproduced at pp. 6-10, *supra.*]

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Exhibit D to Amended and Supplemental Complaint

[Amendment to Complaint filed January 28, 1966, by Plaintiff in The Vendo Co. v. Stoner, et al. (state court case). This document is reproduced at pp. 33-34, *supra.*]

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Exhibit E to Amended and Supplemental Complaint

[Opinion of the Illinois Appellate Court in The Vendo Co. v. Stoner, 105 Ill. App. 2d 261 (2d Dist. 1969). This document is reproduced at pp. 49-81, *supra.*]

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Exhibit F to Amended and Supplemental Complaint

[Opinion of the Illinois Appellate Court in The Vendo Co. v. Stoner, 13 Ill. App. 3d 291 (2d Dist. 1973). This document is reproduced at pp. 94-99, *supra.*]

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Exhibit G to Amended and Supplemental Complaint

[Opinion of the Illinois Supreme Court in The Vendo Co. v. Stoner, 58 Ill. 2d 289 (1974). This document is reproduced at pp. 100-123, *supra.*]

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Transcript of Proceedings
Before the Honorable Richard W. McLaren
on January 23, 1975, at 10:00 a.m.

[CAPTION OMITTED IN PRINTING]

[2] THE CLERK: 65 C 1755, Lektro-Vend Corporation v. The Vendo Company. This is a motion to quash subpoena or, in the alternative, for a protective order.

MR. OCHSENSCHLAGER: Lambert Ochsenschlager. I represent Vendo Company with Mr. Wayne Weiler.

That motion, I would suggest, be deferred until Mr. Baker's motion, which is up at the same time, is heard first.

THE COURT: That motion is for preliminary injunction against the defendant, The Vendo Company, from taking any further action to collect its judgment of August 13, 1971, and for a stay until there can be a hearing on said motion.

MR. BAKER: Good morning, your Honor. James Baker, attorney for the claimant in this case.

Here with me are Mr. Barnabas Sears and Mr. Clifford Yuknis.

I would like to hand up to the Court an additional affidavit bearing on the question of the preliminary injunction.

THE COURT: Has the other side been furnished a copy?

MR. BAKER: Yes, sir, I gave them a copy this morning; two copies, actually. We think there is an emergency, and it is right now, your Honor. That is why we are here, as you know. If your Honor wishes to read the affidavit, I will subside.

[3] THE COURT: It looks like that might take a little time. I understand in general what this is about. Your

state court judgment has now become final, and Vendo wants seven and a half million dollars.

MR. BAKER: It has become final, except that we have in preparation a petition for a writ of certiorari to the Supreme Court. It is not due in there until February 27th. Mr. Sears has been working diligently on that. So that is part of it. So that it isn't final in the sense that—

THE COURT: It doesn't seem to me that you ought to be getting a stay from me in this case in order that you can take that case to the United States Supreme Court. You go either to the Illinois Court or the United States Supreme Court.

MR. BAKER: That is what I would like to explain, your Honor. As you know, there is this judgment, and we can't get a bond or a stay for certiorari. We applied to Judge Schaefer, and he refused to grant it.

We have an escrow trust agreement with The Vendo Company in which the Title Company was holding almost six hundred thousand dollars of funds, and that provided that there would be a stay of any proceedings regarding the judgment until final determination of the case.

Mr. Ochsenschlager has gone in before Judge Peterson in the citation proceeding and against the Title [4] Company, and got Judge Peterson to construe that agreement as meaning that the Supreme Court of Illinois decision is the final determination. We don't think that is so, and we argued against it, and that is on appeal in the Appellate Court for the 2nd District.

In the meantime, in the courtroom the other day out there in Geneva, the Title Company turned over a check for $582,000, so they have got that much money.

The problem is that we think we have a good antitrust case here, your Honor, but if they go ahead with their supplementary proceedings, and they have four of them pending now, we are not going to be able to prosecute it.

I think I don't need to go into the motion for summary judgment and the holding of Judge McGarr, but I think it is implicit from his opinion he thinks we have got a good case. We didn't have it per se; there were questions of motive and intent that required a trial, and we want to try this issue. We have almost overwhelming evidence of anti-competitive motive and intent. But we are not here today to try that on its merits. We hope to persuade the Court to use its power under the Clayton Act and under the All Writs Act to protect its jurisdiction.

Let me explain why this is very significant here. There are three plaintiffs. There is Lektro-Vend Corporation; there is Stoner Investments; and there is Harry Stoner. [5] Now, Lektro-Vend Corporation is owned 79 percent by Stoner Investments and Stoner Investments, in turn—well, Stoner Investments is the largest creditor of Lektro-Vend Corporation.

Lektro-Vend is the company that is in competition with Vendo, the defendant. Stoner Investments is the largest creditor of Lektro-Vend as well. And Stoner Investments is 61 percent controlled by Harry Stoner. And the judgment which Vendo is seeking to collect is now over nine million dollars, and it is against Stoner whose principal asset is the stock in Stoner Investments, and it's against Stoner Investments, whose principal asset is its interest in Lektro-Vend. And if Vendo is permitted to continue the supplementary proceedings to collect the judgment, it will strip both Stoner and Stoner Investments of all their assets, including this 79 percent of Lektro-Vend. So Vendo will then control two of the three plaintiffs in this lawsuit, and could terminate this suit at once insofar as those two plaintiffs are concerned and will have stripped Stoner of his assets so he can't prosecute this action or pay his counsel.

There is a case which I would like to refer to either now or when your Honor will, if your Honor will, give me a

chance to present some of the reasons why I think we are entitled to a preliminary injunction, in which the [6] fact that the defendant would be deprived of the income out of which it could pay its counsel and prosecute the action was the reason why a preliminary injunction was entered.

Now, those are the factors that have weighed heavily with courts in granting preliminary injunctions in antitrust cases. And I ask that your Honor set this motion for preliminary injunction for hearing as soon as possible if your Honor will.

And in support of my further request that your Honor grant a stay, perhaps a temporary restraining order, pending that hearing, I would file these three affidavits.

The first affidavit that is attached to the motion is the Harry Stoner affidavit, and that accomplishes this. He swears to the complaint, so we have, in effect, a sworn Amended and Supplemental Complaint.

My first affidavit, which is filed with the motion papers, identifies the citation proceedings that have been commenced against Stoner Investments in the Circuit Court in Kane County.

My second affidavit which I have just handed up to your Honor sets forth, I hope, in summary form here what I have said, that is, the control by Stoner Investments of Lektro-Vend, and the fact that it is a creditor, and that it has voting control of Lektro-Vend, and that Stoner has [7] voting control of Stoner Investments. Those are the facts which are alleged in the Amended and Supplemental Complaint, and I set them forth in this Affidavit so they would be in logical form here.

Now, they have commenced several supplementary proceedings. One against the Chicago Title & Trust Company and that had been commenced before we filed the Amended and Supplemental Complaint, and we refer to that in the

Amended and Supplemental Complaint. And the fact that the money has been turned over and that we have appealed has happened since that Amended Complaint was filed, and the affidavit refers to that. It states the basis for our motion to vacate, which was lack of jurisdiction of that court under Section 73 to control or I mean to construe that escrow trust agreement or to order the turnover of those funds, and that that is now on appeal.

We also recite in the affidavit that this check for $582,126.09 was actually turned over to Vendo, to counsel for Vendo, Mr. Ochsenschlager.

Also, the affidavit recites the commencement of further supplementary proceedings by the issuance of a citation against Stoner Investments. Mr. Sears filed a motion or a petition for a change of venue before Judge Peterson in the court at Kane County, and he denied that. And then we filed a motion to quash the citation. We also [8] filed a motion to dismiss the citation. We argued those before Judge Peterson, and they are now under advisement there.

They have also started supplementary proceedings against the Valley National Bank in Aurora, and they have caused the citation to be issued. I have got a copy of that citation attached to the affidavit.

A motion for change of venue was filed in that citation proceeding by the attorneys for the Valley National Bank, and it was allowed, and that is pending before Judge Boyle. Actually, it is set for tomorrow on a motion for a turnover order that Mr. Ochsenschlager has filed.

They have found that the Valley National Bank has some $6,800 belonging to The Vendo Company and some $6600 belonging to Stoner Investments, that the building in which the Valley National Bank is located is owned by Stoner Investments, and they are paying rent under a lease, and Mr. Ochsenschlager wants that rent turned over to The Vendo Company. He turned up that Harry Stoner owns 50 shares of stock, and he wants all the dividends on that.

So they are busy stripping all of the plaintiffs in this case of their assets. They have also started, they tell us, further supplementary proceedings by the issuance of a citation directed to Harry Stoner, and that citation has not yet been served.

[9] THE COURT: That would be to get his Lektro-Vend stock?

MR. BAKER: That would be to get his Stoner Investments stock and through control of Stoner Investments to get all of his Lektro-Vend stock that is held by Stoner Investments. That would give Vendo control.

I think one of the early cases—until your Honor gave us a hearing here, I didn't want to get into these cases, but one of the early cases in this field is called Hamilton Watch against Benrus where that is exactly why the preliminary injunction was issued, that the defendant would get control of the plaintiff in the antitrust case if the injunction were not issued.

Also, in addition, as I set forth in Paragraph 7 of the affidavit, we furnished Mr. Ochsenschlager with certain papers relating to the ownership of Stoner Shopping Center which is another entity in which the Stoner family is interested, but which was not a defendant in the state court proceeding, and there is no judgment against it or any of its property.

Now, it may be that Mr. Ochsenschlager has some theories that he may be able to follow that transaction back from 1958 on. But basically, it is owned by Harry Stoner's wife and by his son. The real equity is by his son. But that doesn't say that the property is owned by Stoner Shopping Center; it is not owned by them.

[10] But anyway, Mr. Ochsenschlager apparently has attempted to interfere in some financing that is under way. The Stoner Shopping Center is building a new store—I think it is for Jewel out there—and they had an arrange-

ment with Philipsborn & Company for a mortgage loan of well over a million dollars, and he has called both the mortgage company and the Chicago Title & Trust Company, and in effect what I used to call "slander of title," but anyway he told them they had better look into this transaction carefully before they make any loan.

The Chicago Title & Trust Company on January 17th informed Mr. Sears through its General Counsel that Mr. Ochsenschlager had questioned the propriety of the issuance of a title guaranty policy on this loan for Stoner Shopping Center. Then further on the—

THE COURT: Mr. Baker, what was the seven and a half million dollar judgment for? What was the cause of action? Is that under the state antitrust laws?

MR. BAKER: No, sir. They struck the state antitrust counts from our complaint, and would not permit us to defend or to file a counterclaim. Now, that was based—the original suit was for the violation of some covenants not to compete. Now, that is the heart of our case, the employment of, or I mean, the use of these covenants, their invalidity under the federal law, which, as your Honor has stated [11] before, is a new ballgame over here so far as those covenants are concerned, and this complaint alleges not only that the covenants, but that the entire employment agreement of Harry Stoner and the way they treated him was a device to put him on the shelf, an anti-competitive device. We think we have excellent evidence that is already in this record in connection with our motion for summary judgment which shows that we have a strong likelihood of prevailing before your Honor on that claim. The ties that they—

THE COURT: So that the seven and a half million and the state action substantive issues were directly related to the matter in this court?

MR. BAKER: Yes, sir.

MR. OCHSENSCHLAGER: I beg your pardon.

MR. BAKER: Directly related to the matter in this court.

MR. OCHSENSCHLAGER: Your Honor, I would just like to disagree with that. It is on a breach of fiduciary duty, and the Supreme Court opinion clearly states that.

MR. BAKER: Well, on the Supreme Court opinion, Mr. Sears wants to speak for a moment if he may, your Honor.

MR. SEARS: I don't want to interrupt your Honor if you have a question.

THE COURT: No, I was going to ask Mr. Ochsenschlager to go ahead and respond, but you go ahead.

[12] MR. SEARS: I just want to say that—

MR. OCHSENSCHLAGER: Before I respond to the Judge's question?

MR. SEARS: Whichever the Judge prefers.

THE COURT: Let Mr. Sears go ahead.

MR. SEARS: I want to say about the judgment that was entered, it was obviously entered—the case was tried on a breach of covenants with respect to noncompetitive activities. All through the lawsuit, the case was tried on that basis.

The Appellate Court in the first opinion fixed the law of the case which governed the second trial, and they shifted the theory of their case, claiming that the reason why they didn't have FIFO was the fault of Stoner, which was completely outside of the pleadings.

They tried it on that theory. It went to the Appellate Court the second time. The Appellate Court held that they had completely ignored their mandate. And, incidentally, the Supreme Court had denied leave to appeal from the

judgment which made that mandate final and binding on the parties. And then we get into the Supreme Court of Illinois, and the Supreme Court of Illinois says that it has the power to change the law which governed that trial, that it can ex post facto change the law and affirm the judgment on the basis of a violation of a fiduciary duty amounting to [13] a corporate opportunity when the case was never tried on that basis at all.

THE COURT: What has been said brings back to my mind the basic issues in the state case. Let me hear from Mr. Ochsenschlager.

MR. OCHSENSCHLAGER: If the Court please, Mr. Sears couldn't be more in error. I respect him, but the case was always the breach of fiduciary duty. From the very first day it was filed, it was a breach of fiduciary duty, the misconduct of Harry Stoner as an officer, and director, and employee of The Vendo Company and the things he did to create and build this company that is now called Lektro-Vend, and designed a machine that completely put the machine that he sold to Vendo, just made it obsolete, and that is where all of these damages came.

The theory that we pursued all through the trial in the trial court and the Appellate Court was the conduct of Harry Stoner, and the wrongful conduct as a fiduciary.

The Supreme Court of Illinois went into that in great detail, and they have held that was a fact and they held that this judgment, the original judgment, was proper.

If the Court please, I don't think that it is proper to start a new avenue of appeal; when someone is dissatisfied with the construction of the case in the Illinois Supreme Court, that they should evade their right to [14] certiorari, and come in to a federal court for a review of the basic issues decided by the Illinois Supreme Court.

When we were before Judge Schaefer, he denied them the 30-day stay of mandate. They asked for a two-day

stay, and he denied that, and pointed out that they well knew that if they thought they had merit to it, they should go to the United States Supreme Court and ask for a stay of enforcement of the judgment until such time as they could file their petition for certiorari. This they knew; they have not done. They say here about a bond. The Supreme Court has the right if it wants to to grant that without a bond if the merits of the case so justify.

This case—and I know that we are not supposed to argue here the merits of the antitrust suit that was filed here, but may I just say—

[15] THE COURT: No, let's not get into that.

MR. OCHSENSCHLAGER: May I just say in response to what Mr. Baker said that the case is wholly without merit. It was filed only because we had our state case going and it has been nine, close to ten years it has been sitting here without any effort by them to move on it.

THE COURT: You haven't done very much to move it either.

MR. OCHSENSCHLAGER: If the Court please—

THE COURT: I have tried to move this case for about three years.

MR. OCHSENSCHLAGER: I just trust you are not saying it was my fault. I have never been unwilling to go ahead on it.

THE COURT: I didn't say it was your fault. I say you haven't done anything either.

MR. OCHSENSCHLAGER: No, of course I haven't. They are the plaintiffs. If they want to move their case, I think they should do it.

May I suggest—

THE COURT: The first move is going to be a lot of discovery from your client, as you know.

MR. OCHSENSCHLAGER: We are very willing to do that.

[16] THE COURT: You have been very happy to let discovery rest while you finished up with your State Court proceedings and I—

MR. OCHSENSCHLAGER: I am sorry if I am to blame for that, your Honor.

THE COURT: I don't suggest anybody is to blame for anything but this matter is ten years old. They have a right to a trial on the charges that are made in it.

Why haven't you gone to the Supreme Court for a stay?

MR. SEARS: I will answer that, your Honor.

I have been so busy with these supplementary proceedings and getting this petition for certiorari ready—we have been relying upon an agreement we made where we deposited this money in the Chicago Title and Trust Company. As the evidence will show, upon a hearing for preliminary injunction, we changed title to some twenty-five —don't hold me as to the amount because I may be wrong about that—which were held in the name of a trustee to the name of one or both of the judgment debtors so that their lien would attach upon those judgment. That agreement specifically says that the escrow is not to terminate and we sold property and deposited all of this money on the faith of this [17] escrow agreement which specifically said that it wasn't to terminate until there had been a complete and final determination of the appeal.

Now it didn't say complete and final determination of the appeal by—

THE COURT: It seems to me that is over the dam, Mr. Sears.

Are you going to go to the Supreme Court for a stay or not?

MR. SEARS: Well, if we get these papers ready, but we need a stay now, your Honor, and I think we need—I think your Honor is, without regard to whether we are going to seek a stay from the Supreme Court of the United States, that your Honor has the power in the circumstances of this case and in the light of the claimed—

THE COURT: It seems to me that if you had handled it properly, you will play out the string in the litigation that has the seven and a half million dollar judgment in it and that would mean that you would exhaust all of your possibilities of getting a stay in those proceedings and I would think that it would not take very much to prepare a request for a stay and go down and see Justice Rehnquist and see if you can get a stay [18] from him on that matter while you get your case ready. If he then denies the stay, then you are, I can see, up against the situation that you are talking about this morning. But as of the moment it doesn't seem to me that you have exhausted all of the possibilities that are available to you in that other litigation.

MR. SEARS: With all deference to your Honor, and I certainly have a great respect for your Honor's judgment, we didn't feel that it was necessary to do that in view of the plenary jurisdiction invested in this court as a chancellor to protect the right, but if you think that we should first—and we didn't even—we toyed with the question of whether or not we were required to file a petition for certiorari as a condition of coming in before your Honor to seek the relief that we are asking for, but we didn't want to have that question arise and so therefore we concluded that we would go the petition for certiorari route to protect it because I don't think there is much question about the fact that insofar as the Fourteenth Amendment rights are concerned, to say nothing about protecting the jurisdiction of this court in antitrust matters, that the District Court has the plenary jurisdiction to protect Fourteenth Amendment rights notwithstanding what

the [19] Supreme Court of a particular state has said about those rights because it is not the Supreme Court of the state that decides whether or not—finally decides whether or not there has been an invasion of federally-protected rights and deprivation—

THE COURT: It just seems to me that the orderly procedure would be to go and exhaust that possibility, Mr. Sears.

MR. SEARS: Well, can we have—

THE COURT: I am going to continue the present motion for temporary restraining order and I want you to go and see what you can get from the Supreme Court. If you can't get relief there, I would give you an immediate hearing on the preliminary injunction. I am going to, I think, start a jury case this morning that will take four or five days which would put us into the middle of next week and at that time if you have not been able to get your stay in the Supreme Court, why we will have a preliminary injunction hearing in this case on the question of—

MR. OCHSENSCHLAGER: Your Honor, I am a little hard of hearing. You say we would then have a hearing of the request for a preliminary injunction?

THE COURT: That is right.

[20] MR. SEARS: What happens in the interim, your Honor?

THE COURT: In the interim I am continuing the motion for temporary restraining order because I don't want to act on this until you have exhausted your possibilities in that other case and I think that last step hasn't been taken.

MR. SEARS: What about the State Court proceedings that are pending now?

THE COURT: I am not going to enjoin all of them.

MR. SEARS: What—

THE COURT: I am not going to enjoin all of them at this state. I don't imagine very much is going to happen in them between now and the early part of next week.

MR. BAKER: They have a turnover set for tomorrow morning, your Honor, to get all of the assets that the Valley National Bank has. That is set before Judge Boyle tomorrow morning. That is why we are in here today. That is one of the reasons.

MR. OCHSENSCHLAGER: We have much more to say about the preliminary injunction when that time comes and part of it is that they haven't shown that they will be irreparably damaged. There is no showing that this money is going to be wasted or disposed of out of their presence or not available for them if they should succeed in [21] certain—

THE COURT: You can argue all of that later.

MR. OCHSENSCHLAGER: It is a question of jurisdiction.

THE COURT: You can argue all of that on the preliminary injunction.

MR. OCHSENSCHLAGER: I just didn't want to remain silent while they were arguing the motion.

MR. BAKER: Your Honor, we will go to Justice Rehnquist asking for a stay but I think that whether he gave it out and whether or not the Supreme Court affirms us or not, our complaint is here in the antitrust case. We need protection now from these people. These people are going to have all of our assets by next week if they continue these proceedings that they have pending in the supplementary proceedings. They have got $580,000 already. They have got a proceeding against the Valley National Bank in which they have asked for a turnover tomorrow and I imagine Judge Petson will decide the citation motions

that are pending before him in the proceeding against Stoner Investments and will probably enter a turnover. That is where the harm will come, if he enters a turnover Monday and Tuesday and orders Stoner Investments to turn over the Lektro-Vend stock.

[22] MR. OCHSENSCHLAGER: May I reply to that?

Under the proceedings of citation in the court, they don't turn over the stock in Lektro-Vend to us. They turn it over to the Sheriff and have it sold.

Now we don't know who will get it. We don't want it.

THE COURT: You are arguing the merits now.

MR. OCHSENSCHLAGER: I am sorry, sir. I only did it because of the remarks he made.

THE COURT: I don't think that any of these courts are going to issue forthwith orders when you tell them that you are requesting a stay from the United States Supreme Court and are currently in the process of doing that and that failing it you are asking preliminary relief from this court. I don't think that that is going to happen.

MR. OCHSENSCHLAGER: If the Court please, when we are out there tomorrow, if we have an argument, this is not a direction from this court, it is just your thought on it, is that correct?

THE COURT: I can enjoin the carrying-out of that order just as well afterwards as beforehand provided that the additional steps have been taken and the Supreme Court has had its opportunity to consider the State of [23] Illinois proceedings.

MR. OCHSENSCHLAGER: If the Court please, they undoubtedly take into consideration the fact that they have had from December 9th to make this request and in the meantime they did a 50-page supplemental complaint and many other activities, they went to the Appellate Court in Illinois, to the Chief Justice first, they were denied the

same thing they are asking here. They went to the full panel of the Appellate Court and were denied it. They were denied it in the Supreme Court, they were denied it again in the trial court, and now they are in here. Now they have had this time to ask the Supreme Court for this.

THE COURT: Gentlemen, you ought to have a tenth birthday for this case.

MR. OCHSENSCHLAGER: Yes, your Honor.

The other matter that is up, we will try to be very brief with that. It is just very simple. They want to take my deposition. I know that they can call me as a witness but I would like some protection as to the area of my privilege as attorney for Vendo. If it perhaps is proper that that be raised at the time of the interrogation, that would be understandable, but I do think there should be some protection in there, and, [24] most important, we live and reside and have our offices in Kane County. They want to say that because they are in Chicago, they are asking that —they are directing me to appear in Mr. Sears' office to have this deposition taken. Certainly we are in the same district, in this district, but in Kane County. Kane County is in the same district as Cook County.

THE COURT: When is this deposition set for?

MR. SEARS: It is set for either Monday or Tuesday but we will have to put it over because we are not going to have time to take it if we make an application to Mr. Justice Rehnquist.

If he wants to take it out in his office, that is all right with us.

THE COURT: We will continue that.

MR. SEARS: We are not going to stand on the—

THE COURT: We will continue this motion and dispose of it later on. I think probably once we get these

other questions worked out, you gentlemen ought to be able to work out the details on taking the deposition.

MR. OCHSENSCHLAGER: Thank you, your Honor.

THE COURT: I expect you are going to be back in here if you don't get your relief from Mr. Justice Rehnquist or whoever you see. However, if the matter [25] has not otherwise jelled up to that point, we will set this over until ten o'clock next Wednesday, the 29th of January.

MR. BAKER: Thank you, your Honor, for listening to us.

[CERTIFICATE OF REPORTER OMITTED IN PRINTING.]

MOTION FOR PRELIMINARY INJUNCTION

(Filed January 23, 1975)

[CAPTION OMITTED IN PRINTING]

HARRY B. STONER and STONER INVESTMENTS, INC. Plaintiffs in the above entitled action, move the Court for a preliminary injunction against the Defendant, THE VENDO COMPANY, enjoining the said THE VENDO COMPANY from taking any further steps to collect its judgments of August 13, 1971 obtained in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, pending further order of this Court.

DATED: January 13, 1975.

HARRY B. STONER and STONER INVESTMENTS, INC., Plaintiffs

By .....
Barnabas F. Sears

Of Counsel:
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GLAMBALVO & CROWLEY
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(312) 329-5400

.....
James E. S. Baker

Their Attorneys

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

AFFIDAVIT OF JAMES E. S. BAKER

(Filed January 29, 1975)

[CAPTION OMITTED IN PRINTING]

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

JAMES E. S. BAKER, being first duly sworn, on his oath deposes and says that he is counsel for the Plaintiffs, HARRY B. STONER and STONER INVESTMENTS, INC., in the above entitled action; that he also is of counsel for said Plaintiffs in the case of *THE VENDO COMPANY* v. *HARRY B. STONER and STONER INVESTMENTS, INC.*, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, General Number 65-2134, in which case the said HARRY B. STONER and STONER INVESTMENTS, INC. are Defendants.

That on or about January 6, 1975 there was received in the office of the Plaintiff, STONER INVESTMENTS, INC., in Aurora, Illinois, a copy of a Citation in Supplemental Proceedings to Discover Assets, entitled in said action, which had attached an Exhibit A, three pages in length, which purported to require the production of various documents for the years 1957 through 1975, copy of which Citation and Exhibit A thereto are annexed hereto as Exhibit 1.

JAMES E. S. BAKER
James E. S. Baker

[JURAT OMITTED IN PRINTING]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Exhibit 1 to Affidavit of James E. S. Baker

CIRCUIT COURT FOR THE 16th JUDICIAL CIRCUIT

County of Kane }
State of Illinois } s.s.

THE VENDO COMPANY, A Foreign Corporation
PLAINTIFF

VS.

HARRY B. STONER and
STONER INVESTMENTS, INC.,
A Foreign Corporation
DEFENDANT

Gen. No. 65-2134

Date of judgement:
Month August Day 13 Year 1971

Amount of Judgement: Plus interest;
$7,516,335.00 Plus costs of suit

Amount of judgement not satisfied:
$7,516,335.00 plus interest and costs

Citation directed to:
☐ Defendant ☐ Third Party
Name: Stoner Investments, Inc.
c/o Harry B. Stoner
Address: 900 North Lake Street
City: Aurora, Illinois 60506

To appear:
Date: Tuesday, January 14, 1975
Time: 9:30 a.m.
Room No. 304
Before Judge: John S. Petersen

Attorney: Lambert M. Ochsenschlager
Name: Reid, Ochsenschlager, Murphy & Hupp
Address: 75 S. Stolp, P. O. Box 1368
City: Aurora, Illinois 60507
Phone: (312) 892-8771

Description of Documents:
SEE EXHIBIT "A" ATTACHED

Supplementary Proceedings To
Discover Assets

CITATION

THE CLERK OF THE COURT IS HEREBY DIRECTED TO ISSUE THIS CITATION.

/s/ James E. Boyle
(Judge)

Whereas a judgement was entered in favor of the above named plaintiff and against the above named defendant for the amount and costs shown herein and the amount shown herein remains unsatisfied: and

Whereas the judgement creditor believes that the party to whom this citation is directed has or owns property of or is indebted to the above named defendant:

Now Therefore the party to whom this Citation is directed is hereby cited and required to appear at the time and place stated herein at Kane County Court House Geneva, Ill., for examination concerning the property or income of or indebtedness due the defendant.

You are hereby further cited and required to produce at said time and place the documents described herein and all books, papers or records in your possession or control which may contain information concerning the property or income of, or indebtedness due the judgment debtors.

Witness, Jan Carlson, Clerk of said court, and the seal thereof, at his office at Geneva in said Kane County, this day of Jan. 3, 1975.

(Court Seal)
/s/ Jan Carlson
Clerk of the Circuit Court

NOTICE TO PARTY CITED

You Are Prohibited from making or allowing any transfer or other disposition of, or interfering with, any property not exempt from execution or garnishment belonging to the judgement debtor or to which he may be entitled or which may be acquired by or become due to him and from paying over or otherwise disposing of any money not so exempt, which is due or becomes due to him, until the further order of court or termination of the proceedings. You are not required to withhold the payment of any money beyond double the amount of the judgement.

The attorney who has requested this citation is listed above. Any questions regarding your knowledge of the subject matter or testimony in the case at hand should be directed to him. As a further assistance to you, he has listed the judge and room number where you are to appear.

EXHIBIT "A"—STONER INVESTMENTS, INC.

You are hereby further cited and required to produce at said time and place the documents described herein and all books, papers or records in your possession or control described hereafter as follows:

1. All certificates of deposit, bank statements, bank books, demand account statements and the like evidencing amounts of money on deposit or held on behalf of Stoner Investments, Inc., either solely or in joint tenancy, by any and all banks, savings institutions or depositories wherever located for the years 1957 through 1975 inclusive.

2. Any and all state and federal income, gift or inheritance tax returns, depreciation schedules, financial statements or other documents filed with or used in the preparation of said tax returns by Stoner Investments, Inc., for the year 1957 through 1975 inclusive.

3. Any and all real estate tax bills, personal property tax bills, depreciation schedules, tax returns and the like for any and all assets so taxed or depreciated for the year 1957 through 1975 inclusive.

4. Any and all financial statements, ledgers, accounts receivable, mortgages, chattel mortgages, financial statements, security agreements, judgments or the like in the name of Stoner Investments, Inc., or to which Stoner Investments, Inc., was a party either individually or in any capacity for the years 1959 through 1975 inclusive.

5. Any and all documents or memorandums pertaining to deeds, trust deeds, assignments of beneficial interests, real estate mortgages, financial reports or loan agreements and the like pertaining to any real property owned or in the name of Stoner Investments, Inc., located within the State of Illinois or located in any other state or country for the years 1958 through 1975 inclusive.

6. Any and all Declaration of Trust, trusts, or other documents evidencing any trust or arrangement in which

assets, real or personal, tangible or intangible, were or are held by or on behalf of Stoner Investments, Inc., for the years 1958 through 1975 inclusive.

7. Any and all documents describing the assets or corpus of any trusts or similar arrangements described in the preceding paragraph.

8. Any and all documents evidencing conveyances, transfer or sales of any and all real or personal property by Stoner Investments, Inc., either individually or in any capacity, exceeding the amount of One Thousand Dollars ($1,000.00) for the years 1958 through 1975 inclusive.

9. Any additional papers or documents containing any information as to the location or identification of income or assets of Harry B. Stoner or Stoner Investments, Inc., whether real or personal, tangible or intangible, mixed or the like whether held individually or jointly, or in which any interest whatsoever of value is or was owned or held whether in the expectancy, reversion, remainder or any other capacity recognized at law.

10. Any and all stock certificates, transfer invoices, bond certificates, bond interest coupons, limited partnership agreements, joint venture agreements and the like owned or in the name of Stoner Investments, Inc., for the years 1958 through 1975 inclusive.

11. Any and all patents, patent applications, unfiled patent applications, licensing agreements, licenses for the manufacture, design, modification or production of any mechanical or electrical devices owned by or in the name of Stoner Investments, Inc., for the years 1959 through 1975 inclusive.

12. Any and all bills of lading, accounts receivable, warehouse receipts, bills of exchange, drafts, commercial paper and the like owned by or in the name of Stoner Investments, Inc., for the years 1959 through 1975 inclusive.

13. Any and all copyrights, trademarks, trade names or documents evidencing the sale or licensing of same by Stoner Investments, Inc., for the years 1959 through 1975 inclusive.

14. Any documents or memorandums indicating any choses in action, expected or pending litigation in which Stoner Investments, Inc., is a party in interest for the years 1959 through 1975 inclusive.

15. Any lists, inventories or the like of personal assets of whatever kind and nature furnished to any insurance company for the purposes of insuring said items for loss by fire, calamity, casualty and the like together with the names, addresses and policy numbers pertaining thereto.

16. The names and addresses of any employers, agents, independent contractors, corporations, partnerships or individuals paying Stoner Investments, Inc., any salary, wages, commissions, bonuses and the like for the years 1959 through 1975 inclusive together with any W-2 forms or income tax statements prepared for said years.

17. Any and all documents, books, papers, records, correspondence, notes, security agreements evidencing any gift from Stoner Investments, Inc., or indebtedness to Stoner Investments, Inc., on the part of any person in whatever capacity, including but not limited to the following:

ANN M. STONER;
DAVID STONER;
RUTH LAWRENCE NETREY;
ROD W. PHILLIPS;
WILLIAM PHILLIPS;
GLENN PHILLIPS;
FIRST NATIONAL BANK
OF BATAVIA, ILLINOIS;
MERCHANTS NATIONAL BANK,
AURORA, ILLINOIS;
LEKTRO-VEND CORPORATION,
STONER SHOPPING CENTER, INC.

AFFIDAVIT OF HARRY B. STONER

(Filed January 29, 1975)

[CAPTION OMITTED IN PRINTING]

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH } ss:

HARRY B. STONER, being first duly sworn, on his oath deposes and states as follows:

1. That he is one of the Plaintiffs in the above entitled action and is the President and majority shareholder of the Plaintiff, STONER INVESTMENTS, INC.; that he has read and is familiar with the contents of the Amended and Supplemental Complaint filed in said action on January 2, 1975; that the allegations of said Amended and Supplemental Complaint are true in substance and in fact.

2. That subsequent to the filing of said Amended and Supplemental Complaint, STONER INVESTMENTS, INC. has been served with a Citation in Supplementary Proceedings to Discover Assets in the case of *The Vendo Company* v. *Harry B. Stoner and Stoner Investments, Inc.*, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, which Citation is returnable Tuesday, January 14, 1975, at 9:30 a.m.; that compliance with said Citation would be extremely burdensome and would require the undivided attention of all of the employees of STONER INVESTMENTS, INC. for an extended period of time; that the production of the documents called for would strip STONER INVESTMENTS, INC. of all of its files and records which are needed in the conduct of its business and would prevent affiant from devoting the necessary time and effort to the prosecution of this antitrust case.

3. That affiant believes that said citation proceeding is intended by THE VENDO COMPANY as a method of harassment of your affiant and STONER INVESTMENTS, INC. and constitutes a further effort to harass and destroy LEKTRO-VEND CORP.

HARRY B. STONER
Harry B. Stoner

[JURAT OMITTED IN PRINTING]

ADDITIONAL AFFIDAVIT OF JAMES E. S. BAKER

(Filed January 29, 1975)

[CAPTION OMITTED IN PRINTING]

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

JAMES E. S. BAKER, being first duly sworn, on his oath deposes and says that he is one of the attorneys for HARRY B. STONER and STONER INVESTMENTS, INC., Plaintiffs in the above entitled cause; that he has personal knowledge of the matters hereinafter set forth and states as follows:

1. As set forth in the Amended and Supplemental Complaint herein, the Plaintiff STONER INVESTMENTS, INC. owns 63,900 shares of the common stock of LEKTRO-VEND CORP., also a Plaintiff herein, which ownership constitutes 61% of the equity and 78.57% of the voting power of LEKTRO-VEND. STONER INVESTMENTS, INC. also owns demand notes of LEKTRO-VEND CORP. in the amount of $580,000, as set forth in paragraph 4 of said Amended and Supplemental Complaint. STONER INVESTMENTS, INC., therefore, has voting control of LEKTRO-VEND CORP. and is also its largest creditor.

2. HARRY B. STONER, plaintiff herein, owns 245 shares of the stock of STONER INVESTMENTS, INC., which represents 61.25% of the voting power of said corporation. The only other shareholder of STONER INVESTMENTS, INC. is ANN STONER, wife of HARRY B. STONER, who owns 155 shares thereof. Plaintiff HARRY B. STONER, therefore, has voting control of STONER INVESTMENTS, INC.

3. Commencing in December 1974, THE VENDO COMPANY, Defendant herein, instituted several supplementary proceedings under Section 73 of the Civil Practice Act in an effort to collect its judgments of $7,345,000 against HARRY B. STONER and STONER INVESTMENTS, INC. The commencement of such proceedings and the entry of the turnover

order of December 31, 1974 are referred to in Count II, Paragraph 14, of the said Amended and Supplemental Complaint. Subsequent to December 31, 1974, THE CHICAGO TITLE AND TRUST COMPANY filed a motion to vacate the turnover order entered December 31, 1974 and a motion to vacate said turnover order, based on lack of jurdisdiction of the subject matter in the Court, under Section 73 of the Illinois Civil Practice Act, to construe or terminate said Escrow Trust Agreement, or to order the turnover of said funds contrary to the terms of said Agreement, was also filed and argued under a special and limited appearance by Plaintiffs HARRY B. STONER and STONER INVESTMENTS, INC. Judge Peterson of the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, on January 10, 1975, denied such motions to vacate and THE CHICAGO TITLE AND TRUST COMPANY delivered to the attorneys for Defendant in open court check for $582,126.09, representing all but $400 of the funds held in the Escrow Trust Agreement referred to in Paragraph 14 of Count II of said Amended and Supplemental Complaint. An immediate notice of appeal to the Illinois Appellate Court for the Second District was filed and a stay of said turnover order pending appeal was denied by the Appellate Court on January 14, 1975.

4. Defendant THE VENDO COMPANY has also commenced supplementary proceedings by the issuance of a citation against STONER INVESTMENTS, INC. under date of January 3, 1975, returnable January 14, 1975, which citation is referred to in the affidavit of HARRY B. STONER dated January 10, 1975 heretofore filed herein and a copy of which is annexed to the affidavit of JAMES E. S. BAKER dated January 8, 1975. A Petition for Change of Venue in said citation proceeding was presented to Judge Peterson on January 14, 1975 and denied; a motion to quash the said citation was filed on January 14, 1975 and argued on January 15, 1975 before Judge Peterson, at the conclusion of which said motion was taken under advisement and decision thereon is now pending. Also on January 15, 1975,

HARRY B. STONER and STONER INVESTMENTS, INC. filed their motion to dismiss said citation proceeding based on the agreement for the stay of all proceedings pending final determination, which was provided in the Escrow Trust Agreement between STONER INVESTMENTS, INC. and THE VENDO COMPANY, with THE CHICAGO TITLE AND TRUST COMPANY as Escrow Trustee, on December 14, 1971, which constitutes Exhibit H to the Amended and Supplemental Complaint herein (Paragraphs 12 and 13 thereof). Said motion to dismiss was also argued and taken under advisement by Judge Peterson on January 15, 1975.

5. Defendant THE VENDO COMPANY has started other supplementary proceedings against VALLEY NATIONAL BANK, Aurora, Illinois. Said Defendant caused a citation to be issued January 3, 1975, directed to said VALLEY NATIONAL BANK, returnable January 14, 1975. A copy of said citation is attached to this affidavit as Exhibit 1. A motion for a change of venue was filed in said citation proceeding by VALLEY NATIONAL BANK on January 14, 1975 before Judge Peterson and the proceeding was transferred to Judge James E. Boyle, another judge of the Sixteenth Judicial Circuit, Kane County, Illinois. A motion to quash or, in the alternative, for a limitation of said citation, was filed by VALLEY NATIONAL BANK and the matter has been set for further hearing before Judge Boyle on January 24, 1975, at 9:30 a.m., in Geneva, Illinois. Subsequent thereto, THE VENDO COMPANY has filed a motion for a turn-over order returnable before Judge Boyle at 9:30 a.m. on January 24, 1975, requesting that VALLEY NATIONAL BANK be directed to turn over to THE VENDO COMPANY the balance of $6,875.48 in the personal checking account of HARRY B. STONER and the balance of $6,604.22 in the checking account of STONER INVESTMENTS, INC. The building in which VALLEY NATIONAL BANK is located is owned by STONER INVESTMENTS, INC.; the said motion for turn-over order requests that rent payments due monthly under the lease of such premises be turned over to THE VENDO COMPANY. Said motion further

requests the Court to pay any dividends which may accrue on 50 shares of the capital stock of VALLEY NATIONAL BANK held in the name of HARRY B. STONER be paid to THE VENDO COMPANY. A copy of said motion for a turn-over order is attached hereto as Exhibit 2.

6. The attorneys for THE VENDO COMPANY have also stated that further supplementary proceedings have been commenced by the issuance of a citation directed to HARRY B. STONER but that said citation has not as yet been served.

7. On or about December 9, 1974, affiant and BARNABAS F. SEARS, counsel for plaintiffs HARRY B. STONER and STONER INVESTMENTS, INC., furnished LAMBERT M. OCHSENSCHLAGER, attorney for THE VENDO COMPANY, with copies of certain documents theretofore requested by him, including a memorandum entitled, "Details on Stoner Shopping Center" and a copy of the *inter vivos* trust dated December 31, 1958 between HARRY B. STONER and ANN M. STONER and THE FIRST NATIONAL BANK OF BATAVIA. A copy of the letter of transmittal from Mr. Sears to Mr. Ochsenschlager, dated December 9, 1974, is attached hereto as Exhibit 3; the memorandum dated December 9, 1974 concerning the Stoner Shopping Center is attached hereto as Exhibit 4; and copy of the Trust Agreement of December 31, 1958 is attached to this affidavit as Exhibit 5.

However, notwithstanding the furnishing of such information with respect to Stoner Shopping Center, affiant is informed that the said LAMBERT M. OCHSENSCHLAGER has attempted to interfere in a pending financial transaction involving a mortgage loan for Stoner Shopping Center, Inc. A memorandum dated December 26, 1974 from David W. Stoner to Barnabas F. Sears and your affiant, reporting such interference is attached hereto as Exhibit 6.

On January 17, 1975, THE CHICAGO TITLE AND TRUST COMPANY, through its general counsel, John P. Turner, advised BARNABAS F. SEARS that Mr. Ochsenschlager had ques-

tioned the propriety of the issuance by THE CHICAGO TITLE AND TRUST COMPANY of a mortgage loan guarantee policy on a loan to Stoner Shopping Center. Mr. Turner further advised Mr. Sears on January 21, 1975 that THE CHICAGO TITLE AND TRUST COMPANY had refused to issue a mortgage loan guarantee policy, without an order from the said Judge Peterson permitting it to do so, notwithstanding that the title to the property involved was clearly in Stoner Shopping Center, Inc. and not subject to the lien of the judgments against STONER AND STONER INVESTMENTS, INC.

8. Affiant is informed that rumors of a pending take-over of LEKTRO-VEND CORP. by THE VENDO COMPANY in the course of its satisfying its judgments against STONER INVESTMENTS, INC. and HARRY B. STONER have been circulated in the trade, as a result of which the orders received by LEKTRO-VEND in recent weeks have slowed to a mere trickle. LEKTRO-VEND's orders for the entire month of December, 1974 were equal to the production for three days at normal capacity.

9. Affiant has also been informed by an officer of Harris Trust & Savings Bank, one Roy J. Funkhouser, Assistant Vice President of said bank, that the bank had under consideration the extension of its mortgage loan to LEKTRO-VEND CORP., secured by a mortgage on LEKTRO-VEND's facilities on Sullivan Road, in North Aurora, Illinois and also had under consideration a loan application for funds needed for its operations. Mr. Funkhouser asked affiant if there was to be a hearing on January 16 or 17 with respect to the pending motion for preliminary injunction and stay pending hearing thereof in this case. Mr. Funkhouser informed affiant that if such stay were not granted or the proceeding delayed, the Harris Trust & Savings Bank might well decide that the further financing of LEKTRO-VEND CORP. would be unwise and it might thus refuse to extend said mortgage and make said operating loan.

10. Affiant is informed and believes that a continuation or proliferation of said supplementary proceedings to col-

lect said state court judgments will leave the Plaintiffs HARRY B. STONER AND STONER INVESTMENTS, INC. without funds or assets with which to prosecute this case and will result in the acquisition by THE VENDO COMPANY, in partial satisfaction of said judgments, of control, through stock ownership, of the Plaintiffs STONER INVESTMENTS, INC. and LEKTRO-VEND CORP.

JAMES E. S. BAKER
James E. S. Baker

[JURAT OMITTED IN PRINTING]

Exhibit 1 to Additional Affidavit of James E. S. Baker

CIRCUIT COURT FOR THE 16th JUDICIAL CIRCUIT

STATE OF ILLINOIS } s.s.
COUNTY OF KANE }

THE VENDO COMPANY, A Foreign Corporation
PLAINTIFF

VS.

HARRY B. STONER and
STONER INVESTMENTS, INC.
A Foreign Corporation
DEFENDANT

Gen. No. 65-2134

Date of judgement:
Month August Day 13 Year 1971

Amount of judgement:
$7,516,335.00

Plus interest;
Plus costs of suit.

Amount of judgement not satisfied:
$7,516,335.00 plus interest and costs.

Citation directed to:
☐ Defendant ☒ Third Party
Name: Valley National Bank
Address: 900 North Lake Street
City: Aurora, Illinois

To appear:
Date: Tuesday, January 14, 1975
Time: 9:30 a.m.
Room No. 304
Before Judge: John S. Petersen

Attorney: Lambert M. Ochsenschlager
Name: Reid, Ochsenschlager, Murphy & Hupp
Address: 75 S. Stolp, P. O. Box 1368
City: Aurora, Illinois 60507
Phone: (312) 892-8771

Description of Documents:
SEE EXHIBIT "A"

Supplementary Proceedings To
Discover Assets

CITATION

THE CLERK OF THE COURT IS HEREBY DIRECTED TO ISSUE THIS CITATION.

/s/ JAMES E. BOYLE
(Judge)

WHEREAS a judgement was entered in favor of the above named plaintiff and against the above named defendant for the amount and costs shown herein and the amount shown herein remains unsatisfied: and

WHEREAS the judgement creditor believes that the party to whom this citation is directed has or owns property of or is indebted to the above named defendant:

NOW THEREFORE the party to whom this Citation is directed is hereby cited and required to appear at the time and place stated herein at Kane County Court House Geneva, Ill., for examination concerning the property or income of or indebtedness due the defendant.

You are hereby further cited and required to produce at said time and place the documents described herein and all books, papers or records in your possession or control which may contain information concerning the property or income of, or indebtedness due the judgement debtors.

WITNESS, JAN CARLSON, Clerk of said court, and the seal thereof, at his office at Geneva in said Kane County, this day of Jan. 3, 1975.

(HOUSE SEAL)

/s/ JACOBSON
Clerk of the Circuit Court

NOTICE TO PARTY CITED

YOU ARE PROHIBITED from making or allowing any transfer or other disposition of, or interfering with, any property not exempt from execution or garnishment belonging to the judgement debtor or to which he may be entitled or which may be acquired by or become due to him and from paying over or otherwise disposing of any money not so exempt, which is due or becomes due to him, until the further order of court or termination of the proceedings. You are not required to withhold the payment of any money beyond double the amount of the judgement.

The attorney who has requested this citation is listed above. Any questions regarding your knowledge of the subject matter or testimony in the case at hand should be directed to him. As a further assistance to you, he has listed the Judge and room number where you are to appear.

I certify that I served this Citation on defendants as follows:

(a)—(Individual defendants-personal):

By leaving a copy with each individual defendant personally, as follows:

Name of defendant	Date of service

(b)—(Individual defendants-abode):

By leaving a copy at the usual place of abode of each individual defendant with a person of his family, of the age of 10 years or upwards, informing that person of the citation and also by sending a copy of the citation in a sealed envelope with postage fully prepaid, addressed to

each individual defendant at his usual place of abode, as follows:

Name of defendant	Person with whom left	Date of service	Date of mailing

(c)—(Corporation defendants):

By leaving a copy with the registered agent officer, or agent of each defendant corporation, as follows:

Defendant corporation	Registered agent, officer or agent	Date of service

(d)—(Other service):

....., Sheriff of ..... County

By ....., Deputy

SHERIFF'S FEES

Service and return ..... $.....

Miles..... ....

Total ..... $.....

Sheriff of ..... County

EXHIBIT "A"—VALLEY NATIONAL BANK

You are hereby further cited and required to produce at said time and place the documents described herein and all books, papers or records in your possession or control as follows:

1. Any and all papers, documents, correspondence or records containing any information as to the location or identification of income or assets of Harry B. Stoner or Stoner Investments, Inc., whether real or personal, tangible or intangible, mixed or the like, whether held individually, jointly in trust or in which any interest whatsoever of value is or was owned or held whether in the expectancy, reversion, remainder or any other capacity recognized at law for the years 1959 through 1975, inclusive.

2. Any and all documents containing any information as to any right, title or interest held by Harry B. Stoner or Stoner Investments, Inc., in the Valley National Bank.

3. Any and all records or statements of accounts, deposits, escrows, safe deposit boxes or any other assets or personal property now held by the Valley National Bank in the name of or on behalf of Harry B. Stoner or Stoner Investments, Inc.

Exhibit 2 to Additional Affidavit of James E. S. Baker

STATE OF ILLINOIS } ss.
COUNTY OF KANE }

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

THE VENDO COMPANY, a foreign corporation, **Plaintiff,** vs. **HARRY B. STONER** and **STONER INVESTMENTS, INC.,** a foreign corporation, **Defendants.** and **VALLEY NATIONAL BANK,** Third Party Respondent to Citation Proceedings.	**General No. 65-2134** **Supplemental Proceedings to Discover Assets**

MOTION FOR TURNOVER ORDER

Now Comes The plaintiff, The Vendo Company, a foreign corporation and shows to the Court the following:

1. That pursuant to a Citation served upon the Valley National Bank, the said bank by and through its duly authorized agent Paul Manning produced information as to the following income and indebtedness due by the Valley Bank to the defendants herein:

(a) A certain checking account numbered 4-9002-4 held in the name of Harry B. Stoner which bears a present balance of $6,875.48.

(b) A certain checking account numbered 7-9002-8 held in the name of Stoner Investments, Inc. and carrying a present balance of $6,604.22.

(c) A certain Lease Agreement whereunder the Valley National Bank pays monthly rentals to Stoner Investments, Inc. as follows: the sum of $20,000.00 for each lease year payable in monthly installments of $1,666.66 on the first day of each lease month, in advance; and in addition the said Valley National Bank shall pay each year when ascertained, a sum equal to one-eighth of one percent of the said bank's average deposit liability for the preceding year in excess of $9,000,000.00, computed monthly.

(d) The defendant Harry B. Stoner appears to hold fifty (50) shares of capital stock in the said Valley National Bank; the defendant Stoner Investments, Inc. may also own certain capital stock in the said bank. The said bank has in the past and is now paying dividends to its said shareholders.

2. No other person claims any right, title or interest to any of the said indebtedness or income.

WHEREFORE, the plaintiff, The Vendo Company prays as follows:

1. That the Court enter an order directing the Valley National Bank to turnover to the plaintiff herein the proceeds in its Account No. 4-9002-4 as of the date of its order to be applied on the judgment held herein.

2. That the Court direct the Valley National Bank to turnover to the plaintiff herein the proceeds in its Account No. 7-9002-8 as of the date of said order to be applied on the judgment held herein.

3. That the Court order the Valley National Bank to pay all future rent payments due under the Lease Agreement between the Valley National Bank as lessee and Stoner Investments, Inc. as lessor dated June 5, 1961, and as thereafter amended, to the plaintiff herein to apply on the judgment held in this cause.

4. That the Court order the Valley National Bank to pay all the future dividends due to Harry B. Stoner and/or Stoner Investments, Inc. as shareholders of the said bank to the plaintiff herein to be applied on the judgment held in this cause.

5. That the Court provide such other relief as may appear proper from time to time during the course of the said Citation proceedings pending against the Valley National Bank.

REID, OCHSENSCHLAGER, MURPHY & HUPP
Reid, Ochsenschlager, Murphy and Hupp
Attorneys for The Vendo Company

REID, OCHSENSCHLAGER, MURPHY AND HUPP
75 South Stolp Avenue, P. O. Box 1368
Aurora, Illinois 60507
Telephone: 312 892 8771

Exhibit 3 to Additional Affidavit of James E. S. Baker
December 9, 1974

REID, OCHSENSCHLAGER, MURPHY & HUPP
75 Stolp Avenue
Post Office Box 1264
Aurora, Illinois 60504

Attention: LAMBERT OCHSENSCHLAGER, Esquire

Re: VENDO v. STONER, et al.

Gentlemen:

As we indicated to you the other day, enclosed you will find the following:

1—Financial statement of Stoner Investments, Inc. dated November 30, 1974, consisting of four pages;

2—Financial statement of Harry B. Stoner dated December 8, 1974, consisting of one page;

3—Financial statement of Lektro-Vend Corporation dated October 31, 1974, consisting of three pages; and

4—Details of Stoner Shopping Center dated December 9, 1974, consisting of two pages, with *inter vivos* Trust dated December 31, 1958 relating to said Center, consisting of five pages.

We are holding ourselves ready to meet with you in Aurora on Friday, December 13, 1974. We understand you will call us the afternoon of the 12th to fix the time for such meeting.

Very truly yours,

BOODELL, SEARS, SUGRUE,
GIAMBALVO & CROWLEY

Barnabas F. Sears

BFS:sgr
Enc.

Exhibit 4 to Additional Affidavit of James E. S. Baker
December 9, 1974

DETAILS ON STONER SHOPPING CENTER

The Stoner Shopping Center was organized as a corporation August 30, 1955. The land, owned in joint tenancy by Harry and Ann Stoner, was transferred to Stoner Shopping Center, Inc. upon its incorporation, and each of the founders were issued 10,000 shares of common stock at $1.00 par value.

The land was vacant except for some sewer improvements and remained so at the time of the creation of the irrevocable *inter vivos* trust between Harry and Ann Stoner and the First National Bank of Batavia as Trustee, executed December 31, 1958, a copy of which is attached.

On December 19, 1958, the Articles of Incorporation were amended to reclassify the existing common stock as Class A Common, 1.00 par, and to authorize Class B stock of $10 par value. Class B stock was issued in two increments, one on December 31, 1958, referred to in the *inter vivos trust*. The first issue was 2,000 shares, with a par value of $10.00 per share, purchased by Ann and Harry Stoner for $20,000 and transferred to the Trustee, as recited in the Trust Agreement. On April 5, 1962, an additional 2,000 shares of Class B stock was purchased by Ann and Harry Stoner, for an aggregate of $20,000 and transferred to the trust.

In the Spring of 1971, Harry Stoner sold the 10,000 $1.00 par value shares to Ann for $80,000.00, represented by a note, of which she has paid off $30,000.00, leaving a balance of $50,000.00.

On November 9, 1971, when David Stoner became 25, the trust was terminated and all of its assets were delivered to him by the trustee.

At the present time, ⅔ of Stoner Shopping Center, Inc. is in David Stoner and ⅓ is in Ann Stoner, with David having 16⅔% of the voting rights and Ann having 83⅓% of the voting rights.

Exhibit 5 to Additional Affidavit of James E. S. Baker

THIS AGREEMENT made and entered into this 31st day of December, 1958 by and between HARRY B. STONER and ANN M. STONER, both of the City of Aurora, County of Kane, State of Illinois, hereinafter called the "donors", and the FIRST NATIONAL BANK OF BATAVIA, Batavia, Illinois, a national banking corporation, hereinafter called the "trustee", WITNESSETH:

THAT WHEREAS the donors are the parents of DAVID WAYNE STONER:

AND WHEREAS the donors have heretofore been the sole stockholders of STONER SHOPPING CENTER, INC., an Illinois corporation;

AND WHEREAS the donors have purchased 2,000 shares of the Class B stock of STONER SHOPPING CENTER, INC., and have caused the said shares to be issued in the name of the trustee;

AND WHEREAS the donors propose hereafter that the said STONER SHOPPING CENTER, INC., shall construct and operate a shopping center on land owned by said corporation, and said donors desire that their said son, DAVID WAYNE STONER, shall participate in the profits arising out of the construction and operation of such a shopping center by and through this trust agreement,

NOW THEREFORE in consideration of the acceptance by the trustee of the trust hereby created and the delivery by the donors to the trustee of Certificate No. 1B for 2,000 shares of Class B common stock of STONER SHOPPING CENTER, INC., of the par value of $10.00 per share, the receipt whereof is hereby acknowledged by the trustee, the trustee agrees to hold, manage and disburse the same as a trust estate upon the following terms and conditions:

ARTICLE I.

A. The entire beneficial interest in the trust estate shall immediately vest in DAVID WAYNE STONER, son of the donors, subject to the provisions of this agreement.

B. The trustee shall pay to or apply for the benefit of the said DAVID WAYNE STONER as much of the net income and principal of the trust estate as the trustee shall consider necessary or advisable to assure the comfort, care, support, maintenance, education and medical attention of the said DAVID WAYNE STONER until he shall attain the age of 25 years, or until the earlier termination of this trust as herein provided, or until his death prior to attaining such age. Such payments may be made:

1. Directly to said DAVID WAYNE STONER;

2. To the legal guardian of the said DAVID WAYNE STONER;

3. To a relative of said DAVID WAYNE STONER for the benefit of said DAVID WAYNE STONER, or

4. Directly by the trustee for the benefit of said DAVID WAYNE STONER.

Any income not paid to or for the benefit of said DAVID WAYNE STONER shall be added to the principal of the trust estate.

C. On the date that said DAVID WAYNE STONER attains the age of 25 years, or on direction in writing to the Trustee from the donors or the survivor of them on or after the date when the said DAVID WAYNE STONER attains the age of 21 years, the trustee shall pay and disburse the principal and any accumulated income of the trust estate to him. On the death of the said DAVID WAYNE STONER prior to such payment, the trustee shall pay and distribute the principal and any accumulated income of the trust estate to the person or persons legally entitled thereto either by appointment by said DAVID WAYNE STONER in his last Will and

Testament designating the person or persons and the amounts of such trust estate to be delivered to such persons by the trustee, or, in the absence of the exercise of such power of appointment by said DAVID WAYNE STONER, to the heirs at law of said DAVID WAYNE STONER as determined by the Illinois Statute of Descent.

D. No distribution, charge or encumbrance of the income or of the principal of said trust estate or any part thereof by said DAVID WAYNE STONER by way of anticipation shall be of any validity or legal effect or be in any wise regarded by the trustee, and no such income or principal or any part thereof shall, in any wise be liable to any claim of any creditor of said DAVID WAYNE STONER.

ARTICLE II

The trustee is hereby authorized, ordered and directed to retain the shares of STONER SHOPPING CENTER, INC., as an investment of this trust so long as the donors or the survivor of them, or such person or persons as the donors or the survivor of them may leave their stock of STONER SHOPPING CENTER, INC., under their last wills shall retain their stock in such corporation. Should the donors or the survivor of them, or their said beneficiaries dispose of their interest in the said corporation, then the trustee, in its sole discretion, may either retain or dispose of the shares of stock in said corporation held by it.

With the exception of the direction to retain the Class B stock of STONER SHOPPING CENTER contained in the paragraph immediately preceding this paragraph, the trustee is hereby given full power to invest trust funds in any security or property, including common or preferred stocks, it deems wise without being limited to any statute or rule of law regarding investments by trustees; to retain any of said investments or any property hereafter assigned, transferred and delivered to the trustee as long as it deems wise, to sell, exchange, mortgage and lease trust property; to

participate in and hold the property resulting from reorganizations, consolidations and other changes in the financial structure of corporations or other organizations whose securities are held hereunder; to vote or issue general or limited proxies; to vote stocks or other securities having voting rights; to register or hold property in the name of the trustee, in the name of a nominee or in bearer form; to determine whether receipts and disbursements shall be credited to or charged against income or principal; but income on bonds and similar securities shall be charged to principal and not amortized, and stock dividends and subscription rights shall be considered as principal whether sold or exercised. The trustee shall also have such other powers and discretions as shall at any time be needed to best accomplish the objects of this trust and shall be entitled to reasonable compensation for the services in the administration and distribution of the trust estate.

ARTICLE III

A. The donors hereby expressly declare that it is their intention that this instrument and the trust hereby created shall in all respects and for all purposes be governed, controlled and regulated by the laws of the State of Illinois, and that all questions regarding the construction, interpretation or validity of this trust instrument or any of its provisions shall be determined solely by the laws of that state. Additions of property may be made to the trust by the donors or either of them or by any other persons.

B. Any trustee may resign by instrument in writing delivered to the parents of said DAVID WAYNE STONER, or either of them, or to any legally appointed guardian of said DAVID WAYNE STONER, should the parents both be deceased or legally incapacitated; and said parents or either of them, or said guardian, shall have the right at any time, by instrument in writing delivered to the trustee, to remove any trustee, to approve the accounts of, and give a full and complete release and discharge to any resigned or removed

trustee hereunder, and to appoint any bank or trust company having a qualified trust department, wherever situate, as successor trustee hereunder.

ARTICLE IV

The trust hereby created is hereby declared to be irrevocable and not subject to any modification, alteration or amendment.

IN WITNESS WHEREOF the donors have hereunto set their hand and seals and the trustee has caused this agreement to be executed by its duly authorized officer the day and year first above written.

HARRY B. STONER

ANN M. STONER
Donors

FIRST NATIONAL BANK OF BATAVIA,
Batavia, Illinois

By BRUCE HANCOCK
President

Exhibit 6 to Additional Affidavit of James E. S. Baker

December 26, 1974

MEMO

To: JAMES E. S. BAKER
and
BARNABAS SEARS

On the afternoon of December 24, 1974, I talked with Harry Stern of H. F. Philipsborn & Company, who is arranging some financing for us at Stoner Shopping Center Inc. Mr. Stern advised me that Mr. Oxie had called both Harry Stern and Chicago Title & Trust and advised them that they should make an extra check to make sure that Stoner Shopping Center Inc. had a clear title or right to mortgage the premises in order to secure the loan. The loan is to be secured by the new Jewel Food building, which was the former Community Discount Store. This building is owned, free and clear, by Stoner Shopping Center Inc. and was not, and is not, subject to any other mortgage or financing that may be in force for any other area of the shopping center. Apparently Mr. Oxie made it specifically clear that the amount of the judgment was to be in excess of $9,000,000.00 when interest and all other charges were added. Inasmuch as the litigation to date has not been against Stoner Shopping Center Inc., it appear to be nothing more than a harassment maneuver. This new financing is to be used for some remodelling and additional space to be added for new stores in Stoner Shopping Center Inc.

DAVID W. STONER
David W. Stoner

COUNTER-AFFIDAVIT OF L. M. OCHSENSCHLAGER TO ADDITIONAL AFFIDAVIT OF JAMES E. S. BAKER

(Filed January 29, 1975)

[CAPTION OMITTED IN PRINTING]

State of Illinois }
County of Kane } ss:

L. M. OCHSENSCHLAGER, being first duly sworn, on his oath deposes and says that he is one of the attorneys for The Vendo Company, Defendant in above entitled case; that he has personal knowledge of the matters set forth and states the following:

1. The stock ownership in Lektro-Vend Corp. and owned by Stoner Investments, Inc., as stated in the Additional Affidavit of James E. S. Baker, filed herein and dated the 22nd day of January, 1975 does not reflect the ownership interest as stipulated to by the same James E. S. Baker in the trial of the case of Vendo v. Stoner, Gen. No. 65-2134 in the Circuit Court of Kane County. On page 377 of the Abstract of that case on appeal to the Appellate Court of the Second District of Illinois, such interest of Stoner Investments, Inc. in Lektro-Vend Corp. was but 25%.

2. Vendo does not now and never has had a desire to acquire Lektro-Vend as a company, but in the process of obtaining satisfaction of its judgment against Harry B. Stoner and Stoner Investments, Inc., does desire to recover the money these debtors have invested in Lektro-Vend.

3. Affiant is informed and believes that Harry Stoner has invested heavily in Lektro-Vend in recent years with the hope he could shelter such assets from being applied to the substantial Vendo judgment.

4. To dispel and refute the contention contained in the said affidavit of James E. S. Baker this affiant has caused to be mailed to the attorneys for Harry B. Stoner and Stoner

Investments, Inc., a letter, a copy of which is attached hereto and the contents made a part of this affidavit.

5. Affiant is informed and believes that Harry B. Stoner raises the issue of his interest in Lektro-Vend, through his alter ego, Stoner Investments, Inc., for the main interest of forestalling or preventing the satisfaction of the Vendo judgment from the millions of dollars worth of his assets completely unrelated to Letkro-Vend, and if this court should grant his request for a stay of enforcement of the state court judgment, he would accomplish his objective.

.....
L. M. Ochsenschlager

[JURAT OMITTED IN PRINTING]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

(Letter attached to Counter-Affidavit of L. M. Ochsenschlager to Additional Affidavit of James E. S. Baker)

January 28, 1975

Mr. James E. S. Baker
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Mr. Barnabas F. Sears
Boodell, Sears, Sugrue,
Giambalvo & Crowley
One IBM Plaza
Chicago, Illinois 60611

Re: Lektro-Vend Corp., Harry B. Stoner & Stoner Investments, Inc.
vs.
The Vendo Company
No. 65 C 1755

Gentlemen:

I am shocked at the unwarranted representation you made to Judge McLaren last week when you claimed the purpose and motivation of Vendo in this litigation was for

it to gain ownership or voting control of Lektro-Vend. Nothing could be further from the truth.

You both are aware that in the first trial of the case Mr. Baker stipulated in the record (Page 377 of the Abstract) that Stoner Investments, Inc. owned but 25% of the Lektro-Vend stock and Harry B. Stoner individually owned none. You now claim Stoner Investments, Inc. owns 80% of Lektro-Vend. It was only after the likelihood of a large judgment against Stoner and Stoner Investments, Inc. became apparent that Harry B. Stoner attempted to insulate and shelter his assets from being used to satisfy that anticipated judgment by heavily investing in Lektro-Vend.

Vendo has never had, nor does it now, any desire or intent to acquire ownership or voting control of Lektro-Vend. Its only interest whatsoever in LEKTRO-VEND is the collection of the money judgment affirmed by the Illinois Supreme Court. Accordingly, I am authorized by Vendo to agree, by way of contract or even a consent decree of injunction, as follows:

(1) Should Vendo be the successful purchaser of stock at sale, Vendo will agree, and the consent decree may provide, for divesting at the fair market value but not less than the actual price paid, at the earliest reasonable date. The court would determine the fair market value if the parties were unable to agree.

(2) To assure the absence of any voting power in Vendo at any time should it acquire stock (subject to such obligation of divesting), it shall be immediately placed in a voting trust pending divesture. If we cannot agree on a trustee, the court issuing the injunction can appoint one.

We invite a response to this letter.

Very truly yours,

REID, OCHSENSCHLAGER,
MURPHY and HUPP

LAMBERT M. OCHSENSCHLAGER
Lambert M. Ochsenschlager

LMO/lv

DEFENDANT THE VENDO COMPANY'S OBJECTIONS TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

(Filed January 29, 1975)

[CAPTION OMITTED IN PRINTING]

Defendant objects to the Plaintiff's Motion for Preliminary Injunction for the following reasons:

As to Count I:

(1) Plaintiffs have totally failed to show that they have even the remotest chance of prevailing in their contention that the actions of the Supreme Court of Illinois in affirming a money judgment for damages in favor of The Vendo Company and against Stoner Investments and Harry B. Stoner (*Vendo* v. *Stoner,* 58 Ill. 2d 289 (1974)); the denial of a Stay of Mandate by Justice Walter V. Schaefer on December 4, 1974; the refusal of the Circuit Court of Kane County to stay collection proceedings on January 10, 1975; and the denial of a Motion to Stay Proceedings by the Appellate Court of Illinois, Second District on January 14, 1975, could have caused the lessening of competition between The Vendo Company and Lektro-Vend, which was not a party to the state court action. (See accompanying affidavit).

(2) Section 26, Ch. 15, U.S.C.A., pursuant to which this Motion is brought, confers no authority on the federal courts to enjoin state enforcement of its collection proceedings. *Helfenbein* v. *International Industries, Inc.,* 438 F.2d 1068 (8th Cir. 1971). See also 28 U.S.C.A. § 2283.

(3) The Plaintiffs have failed to comply with the plain reading of 15 U.S.C.A. § 26 that a bond be required for any preliminary injunction sought thereunder. See also Rule 65, F. R. Civ. P.

(4) The Plaintiffs, Stoner and Stoner Investments, have totally failed to show in what manner the collection of monies lawfully owing the Defendant by reason of a final judgment constitutes "a violation of the antitrust laws" within the meaning of 15 U.S.C.A. § 26.

As to Count II:

(1) The Plaintiffs have failed to join the real parties in interest to this lawsuit, being the Supreme Court of Illinois, Circuit Court of Kane County and Second District Appellate Court, for it is the action of those state courts about which Plaintiffs complain deprived them of their civil rights;

(2) Plaintiffs have an adequate remedy at law, being the request to the United States Supreme Court to stay the Mandates relating to the state court judgments.

(3) As a matter of law the Plaintiffs have not shown that Defendant was acting "under color of" state law within the meaning of 42 U.S.C. A § 1983. See *U. S.* v. *Price,* 383 U. S. 787 (1966); *Dixon* v. *City,* 363 F. Supp. 102 (M.D. Fla. 1973).

(4) As a matter of law the federal courts will not enjoin enforcement of a valid judgment of the courts of the State of Illinois. See *McGee* v. *Budget Premium Finance Co.,* 340 F.2d 315 (7th Cir. 1965).

(5) Plaintiffs have failed to comply with the requirements of Rule 65, F. Cir. R. P., relating to the posting of a bond.

LAMBERT M. OCHSENSCHLAGER

REID, OCHSENSCHLAGER, MURPHY and HUPP
75 South Stolp Avenue—P.O. Box 1368
Aurora, Illinois 60507
Telephone: (312) 892-8771

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Transcript of Proceedings
Before the Honorable Richard W. McLaren,
On Wednesday, January 29, 1975

[CAPTION OMITTED IN PRINTING]

[2] THE CLERK: 65 C 1755, Lektro-Vend Corp., et al., v. The Vendo Company; for preliminary injunction against the defendant Vendo Company from taking any further action to collect its judgment of August 13, 1971 and for a stay until there can be a hearing on said motion. There is also a motion to quash.

MR. OCHSENSCHLAGER: My name is Lambert Ochsenschlager representing the Vendo Company.

MR. SEARS: Barnabas Sears.

My name is Barnabas Sears and this is Mr. Baker representing the Stoner Investments and Harry Stoner.

THE COURT: Also Lektro-Vend.

MR. SEARS: And Lektro-Vend, your Honor.

Since we were here last we worked day and night over the week-end and concluded a petition for certiorari which we filed with the Clerk of the Supreme Court on Monday and an accompanying motion to stay. Now the old practice was you used to call the Justice up and I remember years ago I had a hearing on a motion to stay before Mr. Justice Clark and all I had to do was call him, serve notice on opposing counsel and in we went.

THE COURT: You mean they don't do that anymore?

MR. SEARS: They don't do that anymore. That's why —no, they don't do that anymore. You file your motion in the Clerk's office and the Clerk I guess assigns it to the [3] Circuit Justice who in this case, as you know, is Mr. Justice Rehnquist. Then Mr. Ochsenschlager has an opportunity to answer the motion, and that is the status of it now.

He served us this morning with objections that he has to the motion to stay and we asked for a hearing, an oral hearing before Mr. Justice Rehnquist.

We haven't heard anything yet so that is the status of it.

MR. OCHSENSCHLAGER: If the Court please, to complete the status, Mr. Baker kindly cooperatively delivered papers to me Sunday evening in Aurora.

MR. SEARS: I forgot that.

MR. OCHSENSCHLAGER: I immediately got to work yesterday, Monday and Tuesday, and today, as of about now, our response has been filed by messenger in the United States Supreme Court.

Their arguments and ours both involve this case as well as the other one. They brought that into it and we responded so everybody might be enlightened somewhat from it.

THE COURT: I am afraid that there is liable to be a "granted" or "denied" but without an opinion, so how much enlightenment we will get I don't know.

MR. OCHSENSCHLAGER: I might also add, your Honor, [4] that we have voluntarily continued anything pending out in Kane County. We have not asked for any turnovers. We have asked the Court to continue even the matters up tomorrow and Friday for one week and it may be that we have served an additional citation, I don't know as to the exact time, but we are assuring your Honor on the record that we are voluntarily not planning to take any action out there that would in any way result in a turnover and we intend to stay that out there until we hear from the United States Supreme Court, and certainly we would intend to abide by any decision your Honor makes here.

THE COURT: I think that is a very civilized way of handling it, Mr. Ochsenschlager.

I will continue this, then, and you let me know what happens with Justice Rehnquist and as soon as you find that out we will set this down. I will make time and we will get into a preliminary injunction hearing and it will be up to Mr. Sears and Mr. Baker to convince me that I ought to stay this judgment in order that they can proceed in their antitrust case.

MR. OCHSENSCHLAGER: When we were here last time, your Honor, Mr. Baker and Mr. Sears filed an affidavit by Mr. Baker. He delivered it to me just before your Honor came onto the bench and I would like to ask leave to file a counteraffidavit by me to the additional [5] affidavit of James E. S. Baker for the record in which I respond to some of the matters that they have there.

I would also like to ask the Court if it would be appropriate in view of the fact that this is going to come up anyway, even though the stay is denied before your Honor—would it be appropriate if we were each allowed to or ordered to furnish some briefs on the question of jurisdiction of this Court under the circumstances and the propriety or lack of necessity of a bond in the event the injunction were granted here because we have—

THE COURT: I have really no question in my mind about either one. I am sure I have jursidiction and I am sure that there would have to be a substantial bond.

MR. OCHSENSCHLAGER: If your Honor has decided, then of course—

THE COURT: Do you gentlemen disagree with that?

MR. SEARS: I think your Honor doesn't have to require a substantial bond. I think we would want to argue that on the application for preliminary injunction. I have read some of the cases and maybe I read them erroneously, that has happened many times, but I think that the matter of the bond where your Honor is acting as a chancellor, the matter of the bond depends upon the particular and pecu-

liar exigencies of the case and it is a matter within the discretion of your Honor. I believe the cases hold [6] that.

THE COURT: I think the rule kind of indicates, though, that in the normal case you do require a bond.

MR. SEARS: That is right. I agree with your Honor. I think that is correct.

THE COURT: I think we are crossing a bridge here before we have to.

MR. OCHSENSCHLAGER: The only thing I was suggesting, your Honor, I realize we are here this morning, we are here on Wednesday, and I am not as competent as these lawyers and I pretty much in the short time I am allowed here cannot present my authorities as well as I could by way of a brief.

Now on this question of the bond, I completely disagree with the man I respect so greatly, Mr. Sears, but I can furnish cases which say that that statutory provision, the Court rules and everything else means a bond, and in this case it would be a substantial one in view of the large judgment.

THE COURT: Yes, but that is something we would decide in connection with the injunction and we don't even reach it until we decide that a preliminary injunction should be issued.

So I will grant you leave to file the additional affidavit that you want to file and then what shall we do, [7] put this over for a week just to have a date on it?

MR. SEARS: That is all right.

THE COURT: Then you gentlemen can notice it up if you hear anything earlier and we will see what we can work out timewise.

MR. OCHSENSCHLAGER: A week from today we will report to you what has happened and then set a date for the other—

THE COURT: I recognize that this is a long trip in for you from Aurora and if nothing has happened it would be perfectly satisfactory to simply telephone the Clerk and tell him nothing has happened and ask for an extension and we will just put it over by telephone.

MR. OCHSENSCHLAGER: I am sure we will cooperate in getting in here and not delaying, either one, in the event they want to raise this question again.

THE COURT: All right, sir.

THE CLERK: 2-5 and is the date contingent on their notifying me?

THE COURT: The 2-5 date is there subject to being continued if they haven't heard from the Supreme Court.

MR. SEARS: In other words, if we hear from the Supreme Court in the interim, does your Honor want us to communicate with you then or to communicate the fact next week when we come in.

THE COURT: I think that the earlier you can come in [8] the better because I will have to start making some time, figuring out how to make some time to hear this. I think that the hearing on preliminary injunction is going to take some time.

MR. SEARS: That is right.

MR. OCHSENSCHLAGER: Let's communicate with the Clerk the minute we hear from the Supreme Court.

MR. SEARS: All right. Then we will communicate with the Clerk and it may be that your Honor will hear it before the week is up and we can come in on that day and have the whole thing set, is that right?

THE COURT: Right. That will be to set for a certain time because I do have trials set and other counsel bringing in witnesses, and so on, and so we will just have to find time as soon as possible.

I want to say again I think this is a very civilized way of handling it. I appreciate your holding off, Mr. Ochsenschlager, until we can really get down to the merits of this thing.

MR. OCHSENSCHLAGER: Yesterday it was a matter of a change of venue where one of the persons cited in requested that and all we did was a young man went over to Judge Peterson and did not oppose the change of venue. But we didn't move beyond that so that we now will have the right Judge handling it.

[COURT REPORTER'S CERTIFICATE OMITTED IN PRINTING]

Table of Contents from Post-Trial Brief for Defendant, The Vendo Company, in Opposition to the Motion of Harry B. Stoner and Stoner Investments, Inc. for Preliminary Injunction

(Filed April 16, 1975)

[CAPTION OMITTED IN PRINTING]

Transcript of Proceedings Before the Honorable Richard W. McLaren on May 29, 1975

[CAPTION OMITTED IN PRINTING]

[2] THE CLERK: 65 C 1755. Lektro-Vend v. Vendo Corporation. Ruling on motion for preliminary injunction.

THE COURT: You gave me a real hot potato in this case.

I have finally come to the conclusion that in order to protect the jurisdiction of this court that I will issue a stay order. All of the liens and escrows and all of these things that are now in effect will remain in effect and we will ask the plaintiffs for a nominal bond, I think $25,000, since everything else seems to be pretty well tied up anyway, and it may be that we are going to have to have a somewhat more elaborate restraining order to cover exactly how things will work, including a continuation of my order that the plaintiffs see that the title isn't clouded by failure to pay taxes and things like that.

I have a memorandum of opinion of some length that is in preparation and we will get it to you just as soon as we can.

In the meantime you may consider that the state proceedings or further action in the state proceedings are stayed. I want you gentlemen to start taking a look at this case in terms of getting it ready to try. [3] It is the oldest case I have got and I suppose you are going to have to have supplemental discovery. I want you to get that done promptly over the summer if possible and see if we can't get this thing to trial in the fall.

MR. BAKER: We filed a memorandum of discovery that we intended to take.

MR. OCHSENSCHLAGER: Your Honor, you say you have a memorandum opinion that we will receive today?

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[4] MR. OCHSENSCHLAGER: You will date it today. That is what I was concerned about. So that we can designate it as an order of today in our notice of appeal.

THE COURT: All right, gentlemen.

In consideration of your intentions on that score, I think it is probably idle to set any further dates at this point or try to schedule anything until we find out what the fellows upstairs have to say about my analysis.

MR. OCHSENSCHLAGER: Do I understand correctly, Judge—I am a little hard of hearing—do I understand that you [5] have set a bond of $2500?

THE COURT: Yes, with all of the other liens and the escrow agreement and so on to stand. I understand that pretty well all of the assets are tied up.

MR. OCHSENSCHLAGER: The escrow agreement? I don't understand.

THE COURT: What do you say?

MR. OCHSENSCHLAGER: The escrow agreement?

THE COURT: That was already paid out.

MR. OCHSENSCHLAGER: Yes. There is nothing to that any more.

THE COURT: No, but that would apply, of course, against the judgment, and the very basis of the decision, of course, is to protect this court's jurisdiction and to leave the plaintiffs with some money to prosecute this case. If I had them put up the kind of a bond that you might normally expect where there is a $7,000,000 judgement, I think I might be defeating the purpose of the basic ruling. So you may want to include that in your appeal.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, **HARRY B. STONER** and **STONER INVESTMENTS, INC.**, a Delaware corporation, **Plaintiffs,** v. **THE VENDO COMPANY**, a Missouri corporation, **Defendant.**	**No. 65 C 1755**

MEMORANDUM OPINION AND ORDER

(Filed May 30, 1975)

I.

This is a complex antitrust action[1] by Lektro-Vend Corporation, Harry B. Stoner and Stoner Investments, Inc., plaintiffs, against the Vendo Company, the defendant. Vendo recently obtained a $7,345,500 state court judgment against Mr. Stoner and Stoner Investments for violation of their purported fiduciary duties to Vendo. *Vendo* v. *Stoner*, 58 Ill.2d 289, N.E.2d (1974), *cert. denied*, U.S. (1975). Plaintiffs[2] now seek a preliminary injunction preventing Vendo from taking any further steps, pending a trial of this case, to collect its state court judgment, urging that the state court proceedings did not take account of Vendo's violations of antitrust law and were prosecuted in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. For the reasons and on the conditions stated below, the motion will be granted. Insofar as required, this opinion shall constitute the Court's findings of fact and conclusions of law. F.R.Civ.P. 52(a), 65(d).

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[1] Plaintiffs also assert a civil rights claim pursuant to 42 U.S.C. § 1983 claiming certain portions of the Illinois Supreme Court decisions violated procedural and substantive due process. The Court has no jurisdiction to entertain this claim. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *Louis Ender Inc.* v. *General Foods Corp.*, 467 F.2d 929 (8th Cir. 1972); *Sarelas* v. *Slechan*, 326 F.2d 490 (7th Cir. 1963). As explained in *Adkins* v. *Underwood*, 370 F. Supp. 510, 514-15 (N.D.Ill. 1974):

> "While lower federal courts were given certain power in the Judiciary Act of 1789, they were not given any power to directly review cases from state courts, and they have not been

(Footnote continued on following page.)

(Footnote continued from preceding page.)

> given such power since that time. . . . Only the Supreme Court is authorized to review on direct appeal the decision of state courts. From the beginning this country has had two essentially separate legal systems. Each system, federal and state, proceeds independently of the other with ultimate review in the United States Supreme Court of federal questions raised in either system.
>
> "Even if a state court decision is constitutionally wrong, that does not make the judgment void, it merely leaves it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than the United States Supreme Court can entertain a proceeding to reverse or modify a state court judgment which is in error."

[2] The motion for preliminary injunction only sought relief for Mr. Stoner and Stoner Investments, not Lektro-Vend Corporation. It is clear, however, that the hearing litigated the interests of all three plaintiffs and that Vendo acquiesced in this procedure. Plaintiff's motion to amend the motion to include Lektro-Vend is therefore granted.

To demonstrate the necessity of a preliminary injunction a brief excursion into the history of the relationship between the parties is required. This action has its genesis in the 1959 purchase of Stoner Manufacturing Corp. by Vendo. This sale was occasioned primarily by Mr. Stoner's health problems. At that time Stoner Manufacturing was primarily a producer of candy vending machines throughout the United States. Vendo prior to 1959 was a manufacturer of beverage and ice cream vending machines. The record in the state court proceedings and here demonstrates that Vendo had two purposes in purchasing Stoner Manufacturing: expansion of its product line[3] and elimination of Mr. Stoner as a potential competitor in the vending machine market. The parties agree that Mr. Stoner was a design genius in creating innovative vending machine products.

The sale agreement between Vendo and Stoner Manufacturing provided that Vendo would pay the Stoner interests $3,400,000 and deliver 60,000 shares of Vendo stock to Mr. Stoner. This made Mr. Stoner a major shareholder of Vendo. Mr. Stoner also became an officer and director of Vendo. His employment contract with Vendo had a five year term and his salary was $50,000 per year. The 1959 agreements also provided that Stoner Manufacturing would not directly or indirectly participate in the management, ownership or control of a vending machine business for ten years in the United States or any foreign country in which Vendo was doing business. Mr. Stoner's employment contract provided that for a period of five years following the termination of his employment, Mr. Stoner would not compete with Vendo in any territory in which Vendo was doing business or intended to do business.

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[3] Federal Trade Commission approval was required before Vendo could purchase the Stoner vending machine interests. Apparently this was accomplished by misrepresenting to the Commission that Stoner Manufacturing and Vendo were not actual or potential competitors. The record demonstrates that at the least Vendo was a potential competitor of Stoner Manufacturing.

Shortly after the 1959 agreements were consummated Mr. Stoner and Vendo had a falling out. Mr. Stoner had been led to believe he would be able to take an active role in research and development and would be treated as chairman of the board with respect to operation of the purchased assets of Stoner Manufacturing. In actuality Mr. Stoner was virtually ignored or bypassed by the Vendo management. The Vendo management admittedly was thus only paying Mr. Stoner not to compete rather than employing him for performance of actual services.

The succeeding events are adequately set out in the first opinion of the Illinois Court of Appeals at 105 Ill.App.2d 261, 269-77. During the fall of 1960 Mr. Stoner began financing vending machine research and development by certain former Stoner Manufacturing employees. This work culminated in the development of a revolutionary first-in-first-out (FIFO) candy vending machine, called the Lektro-Vend machine. The first prototypes of the Lektro-Vend were exhibited at a trade show in October 1962. Vendo employees were present and made initial inquiries about purchasing the design. The inventors, however, decided to manufacture and market the machine on their own. Mr. Stoner was asked to join these efforts. Thus in December 1962 Mr. Stoner sought to be released from his Vendo employment contract stating that he wanted to invest in the Lektro-Vend machine. Mr. Stoner did not disclose at that time his previous backing of the Lektro-Vend project.

Vendo refused the release request because it did not want to compete with Stoner. Vendo officials stated that part of the consideration for the 1959 agreements was the non-competition clauses. Instead, Stoner was requested to help Vendo purchase the Lektro-Vend from the inventors. The inventors sought $1,500,000; Vendo thought this price too high and declined to purchase the machine. Vendo also thought that there were inherent technical problems in the Lektro-Vend and that it was too costly to

produce. Mr. Stoner warned that was a serious mistake not to purchase the Lektro-Vend.

Some time shortly after the Vendo refusal to purchase the Lektro-Vend, Mr. Stoner revealed his financial support of the Lektro-Vend inventors. It appears, however, that Vendo was well aware of the Stoner involvement with Lektro-Vend as early as the 1962 trade show.

Mr. Stoner's and Stoner Investments' involvement with the Lektro-Vend inventors and the Lektro-Vend Corporation continued. Stoner Investments helped Lektro-Vend Corporation establish a production plant and further loans or loan guarantees were made by both Mr. Stoner and Stoner Investments. Meanwhile Mr. Stoner's employment contract with Vendo terminated on June 1, 1964, although Mr. Stoner remained on the Vendo board until the spring of 1965. It is clear, however, that neither Mr. Stoner nor Vendo thought until late in the state court litigation that this relationship created for Mr. Stoner any further obligations beyond those duties purportedly contained in the non-competition covenants.

In March 1965 Lektro-Vend salesmen reported that Vendo salesmen were circulating rumors in the trade that Lektro-Vend was about to go out of business. Mr. Stoner responded with a letter to 50 vending machine operators. This letter, denominated by the parties as the "Dear Operator" letter, stated that Stoner was now "interested" in Lektro-Vend Corporation and would guarantee its continued existence.

Conflict between the parties sharpened in August 1965 when Vendo brought suit against Mr. Stoner and Stoner Investments. The Court proposes to examine these proceedings only insofar as they may reflect illegal anti-competitive conduct by Vendo. The original Vendo complaint focused on alleged violation of the non-competition covenants in the employment and sales agreements and sought $500,000 in damages. This complaint was amended to add

a charge of theft of trade secrets and the ad damnum was raised to $1,500,000. An injunction against Stoner and Stoner Investments preventing further aid to Lektro-Vend running until July 1, 1969 was also sought. The Illinois Appellate Court opinion after the first trial reveals that the evidence during the first trial was directed to the covenants and the trade secrets issue. After the first trial, the Illinois trial court entered judgment against Mr. Stoner for $250,000 for violation of the covenants and $1,100,000 for theft of a trade secret. The Appellate Court at 105 Ill.App.2d 261 reversed as to the latter, stating that Vendo had no trade secret. It is clear from all the evidence that Vendo should have known that there was no theft of a trade secret; indeed, the first Illinois Court of Appeals' decision demonstrates that the effort by Vendo to prove theft of a trade secret amounted to vexatious litigation.

The Appellate Court remanded the case with directions for further hearings on damages. Before the second state trial, Vendo again raised the ad damnum, this time to $7,345,500. At trial, however, Vendo attempted to prove the entirely new theory that Stoner was legally at fault for Vendo's failure to have a FIFO machine. On this basis, the trial court entered judgment against Stoner for $170,835 for forfeiture of salary for the time in which he purportedly illegally competed, and for $7,345,500 against Stoner and Stoner Investments for the lost profits for failure of Vendo to have a FIFO machine. Mr. Stoner and Stoner Investments again appealed and the Appellate Court again reversed, stating that Vendo's failure to have a FIFO vending machine was not attributable to the Stoner interests. The salary forfeiture was affirmed. Each side was then granted leave to appeal to the Illinois Supreme Court.

The Illinois Supreme Court reinstated the trial court judgment, predicating liability on a corporate opportunity theory. It held that as a director of Vendo Mr. Stoner breached his fiduciary duty by failing to adequately disclose his financial involvement in the Lektro-Vend machine.

The court thus concluded that it could not say that Vendo would have declined to purchase the Lektro-Vend machine had adequate disclosure been made or a genuine opportunity to purchase existed. It affirmed the $7,345,500 damage award on the Vendo lost profits theory. The Stoner interests sought a rehearing on the grounds that the corporate opportunity theory denied it substantive and procedural due process because Stoner was functionally denied a trial on this issue. The Illinois Supreme Court denied the petition for rehearing and a petition for certiorari was subsequently denied by the United States Supreme Court. As noted above, the Court believes that it does not have jurisdiction to review the due process aspects of the state court proceedings; however, as will be more fully explained below, the state court proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anti-competitive scheme.[4]

II.

Three legal issues are raised by the brief outline of facts just concluded: (1) Have plaintiffs established under the four usual requirements that a preliminary injunction is necessary? (2) Have plaintiffs met their special burden of establishing the necessity for enjoining a state court proceeding? (3) Assuming an injunction is necessary, what type of bond is appropriate?

A.

The four factors usually examined to determine whether interlocutory relief is appropriate are:

(1) likelihood of ultimately prevailing on the merits;

[4] The final Illinois Supreme Court opinion makes such a review imperative. The Illinois court expressly refused to consider the allegations that the state proceedings were part of an anticompetitive scheme. Plaintiffs, having never had a trial on this issue, must be heard in the only forum now available.

(2) likelihood of irreparable harm;

(3) balancing the hardships; and

(4) protection of the public interest.

In the instant case, this Court believes that plaintiffs have demonstrated likelihood of ultimate success on both the section 1 and section 2 Sherman Act claims. The section 1 claim arises from the 1959 agreement. Under section 1 of the Sherman Act, contracts which unreasonably restrain interstate commerce are void. The federal antitrust laws make covenants not to compete which are overly broad in geographical scope or in time unreasonable restraints of trade. Once antitrust jurisdiction is invoked, the validity of the challenged covenants is measured solely under federal law, regardless of legality under state law. *Schine Chain Theatres* v. *United States,* 334 U.S. 119 (1948).

Under federal law a non-competition covenant is legal under two conditions:

(1) the covenant is merely ancillary to the main purpose of a lawful contract;

(2) the covenant is necessary to protect the legitimate property interests purchased by the covenantee. See *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), *aff'd as modified,* 175 U.S. 211. Moreover, a covenant not to compete examined in light of other monopolistic practices can be declared illegal even if otherwise lawful if it can be shown that the object and the effect of the agreement was primarily directed at the elimination of competition. *Schine Chain Theatres* v. *United States, supra; Bowl America, Inc.* v. *Fair Lane, Inc.,* 299 F.Supp. 1080 (D.Md. 1969).

Here it appears that the covenants extracted were overly broad, and the facts and circumstances surrounding the 1959 agreement and subsequent activities demonstrate that their object (and effect) were primarily directed at the

elimination of competition rather than protection of good will. As drafted, the covenants were intended to protect the good will of Vendo where Vendo was doing or planning to do business; they were not limited to areas in which Stoner Manufacturing was operating. Under *Addyston Pipe* and similar cases this amounts to prima facie proof of illegality. Additionally, Vendo's president admitted the major purpose and intent of the employment contract was to obtain the anticompetitive benefits accruing from the covenants. It should also be noted even after Vendo received notice that Stoner was involved in the Lektro-Vend project it refused to terminate his employment as the contract allowed. It appears to the Court that this course of conduct was adopted by Vendo in an attempt to limit Mr. Stoner's activities for the full planned term of the post-employment agreement, showing that protection of good will was not a significant goal in obtaining the covenant. Since Mr. Stoner apparently was never called upon to perform significant services for Vendo the covenant amounted to a naked agreement not to compete, solely anticompetitive in purpose and effect.

Vendo argues that even if the covenants are illegal under section 1 of the Sherman Act, the state court judgment did not rely on these contractual terms and therefore is unassailable. The section 1 claim does not rest alone on the theory that the state litigation was an essential part of an illegal anticompetitive scheme but rather depends on an analysis of the total circumstances surrounding creation of the 1959 agreements. The Court believes that viewed in this light the corporate opportunity theory relied on in the final state court decision cannot either in logic or as a matter of federal antitrust law be separated from the anticompetitive intent and effect of the covenants. Mr. Stoner's position as a director was dependent on the acquisition and employment contracts. He would not have become a corporate director of Vendo absent entry of the anticompetitive agreements. Additionally, his status as a director clearly was not intended to create additional

duties; it only encompassed duties already undertaken as an employee of Vendo. The general rule that where a contract is only partially illegal under the antitrust laws, the illegal portions can be severed, is therefore inapposite. Here the anticompetitive clauses are essential primary elements of the bargain and thus cannot be severed, making all elements of the 1959 agreements unenforceable. See *Superior Bedding* v. *Serta Assoc., Inc.*, 353 F.Supp. 1143 (N.D.Ill. 1972). See also *Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 8 F.R.D. 347 (D.N.J. 1948), *aff'd* 96 F.2d 90 (3d Cir. 1949). Vendo's reliance on the ultimate theory of the state court litigation thus is not well taken. The 1959 agreements were cut from one piece of anticompetitive cloth and cannot be snipped apart.

Plaintiffs also argue that a violation of the "attempt to monopolize" proscription of section 2 of the Sherman Act occurred here. To prove violation of section 2, plaintiffs must establish three elements of proof: (1) a dangerous probability of actual monopolization in a relevant market; (2) specific intent to establish a monopoly power; and (3) overt acts. Plaintiffs need not prove that Vendo has succeeded in establishing monopoly power but must merely show that Vendo has the capacity to make a serious attempt to acquire monopoly status. *Lorain Journal* v. *United States*, 342 U.S. 143 (1951); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971).

In the instant case the relevant market is a recognized sub-market within the vending machine industry—coin operated food and beverage vending machines. Lektro-Vend and Vendo are actual competitors in the sub-market, although the price structure of the industry prevents absolute congruity of competition. The geographic market is nationwide in scope. Within this market the number of competitors has been steadily declining. Between 1958 and 1966 the number of vending machine manufacturers was nearly halved and the number of competitors with sales over $100,000, particularly in the candy bar section of the industry, became quite small. Within this increasingly con-

centrated market, Vendo maintained a significant market share. While it appears that the evidence is somewhat in conflict, Vendo's market share is most probably over 20%. The "attempt to monopolize" prohibition in section 2 was intended to "nip incipient monopolies in the bud"; with this congressional policy in mind, considering the structure of the vending machine industry, the Court believes that, unchecked, Vendo's alleged practices raise a dangerous propensity for creation of an actual monopoly.

The Court also finds that plaintiffs have produced substantial evidence that Vendo had the required specific intent to monopolize and that it performed overt acts intended to create a monopoly position. Prior to 1959, Vendo had an aggressive acquisition program to buttress its product line and market share. The courts have consistently held that such conduct, along with other evidence of anticompetitive conduct, is persuasive evidence of an attempt to monopolize. See *e.g., United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966). Vendo's uniform policy of extracting broad covenants not to compete—such as the ones involved in the instant litigation—also evidences specific intent to monopolize. In addition, there is evidence that Vendo used litigation as a method of harassing and eliminating competition.

The right to litigate commercial controversies comes within the penumbra of the first amendment. *Cf. Eastern R.R. Pres. Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972). However, if litigation is used as an integral part of a scheme attempting to monopolize and exclude competition from the marketplace, that litigation can lose its first amendment protection. *Walker Process Equip.* v. *Food Mach. Corp.,* 382 U.S. 172 (1965). As the Supreme Court stated in *California Motor Transport:*

> "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute . . . . If the end result is unlawful, it matters not what the means used in violation may be lawful." 404 U.S. at 5145

This holding was recently reaffirmed in *United States* v. *Otter Tail Power Co.,* 410 U.S. 366 (1973); *aff'd after remand,* 417 U.S. 901 (1974). Thus if plaintiffs can prove that Vendo's state court litigation against the Stoner interests was not a genuine attempt to use the adjudicative process legitimately, antitrust liability in the instant case under section 2 of the Sherman Act would follow. *Cf. Metro Cable Co.* v. *CATV of Rockford,* 74-1492 (7th Cir. April 2, 1975). See also *Mach-Tronics Inc.* v. *Zirpoli,* 316 F.2d 820 (9th Cir. 1963) (antitrust liability arises from anticompetitive institution of state trade secret case); *Kobe, Inc.* v. *Dempsey Pump Co.,* 198 F.2d 416 (10th Cir. 1952).

There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately. Its theft of trade secret claim was clearly non-meritorious and litigation of this claim might well be interpreted—considering the record as a whole—as an attempt to further harass the Stoner interests and limit the amount of aid Stoner could lend Lektro-Vend. The attempt to enforce the covenants not to compete by way of injunction and damages may be similarly indication of a violation of section 2. It may also be argued that, had this litigation been legitimately undertaken to protect good will or confidential information, Vendo would have exercised its right to terminate Mr. Stoner's employment as soon as it discovered Mr. Stoner's relationship with the Lektro-Vend project; instead it prolonged Mr. Stoner's employment for the full term even though he was given no duties. As noted above, the intent of this action appears to have been to lengthen the period for which the non-competition covenants would run. The purpose of this portion of the state litigation seems purely anticompetitive. If so, this

scheme was successful, for the state litigation severely hampered Lektro-Vend's development.

Despite the above stated line of reasoning, defendant contends that the Supreme Court's decisions in *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947) and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959) bar injunctive relief under the instant circumstances. These cases hold that the antitrust laws provide no defense for actions under state law for collection of debts for sale of goods and services:

> "If the contract provisions sued on in the state court do not embody or further the anti-competitive practices, then there has been no irreparable loss or damage from *violation of the antitrust law*" requiring injunctive relief.

Response of Carolina v. *Leasco Response, Inc.*, 408 F.2d 314, 319 (5th Cir. 1974).

However, when the precise conduct proscribed by the antitrust laws is sought to be furthered in a state court action, the antitrust defense and injunctive relief are available in federal court. *Continental Wallpaper Co.* v. *Lewis Voigt & Sons*, 212 U.S. 227 (1909). See also *Farbenfabriken Bayer, A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962). *Bruce's Juices* and *Kelly* therefore do not apply. If the state court litigation was itself part of the anticompetitive scheme, a judgment arising from such litigation is not an ordinary debt.

On the record as a whole, the Court finds that a preliminary injunction will prevent irreparable harm, protect the public interest, and will benefit plaintiffs more than it will burden Vendo. Continued efforts at collection will prevent Lektro-Vend Corporation from marketing a promising, newly-developed vending machine. The state court collection process places insurmountable barriers in the way of raising capital for any expansion program. Moreover, collection of the state judgment will effectively place Lektro-Vend in the hands of—or at least at the disposition

of—Vendo. Stoner Investments is controlled by Mr. Stoner; 78.57% of Lektro-Vend is owned by Stoner Investments. Needless to say, Vendo would also control Stoner Investments. The case or controversy requirement contained in Article III then would require dismissal of Lektro-Vend and Stoner Investments. *Cf. Mar Foods* v. *First Nat'l Bank of Chicago*, 73 C 1959 (N.D.Ill. November 6, 1974). Continued collection thus would eliminate two of the plaintiffs herein. Moreover, Mr. Stoner's ability to effectively prosecute this action would be severely limited by further execution of the state court case. This also amounts to irreparable harm. *Milsen* v. *Southland*, 454 F.2d 363 (7th Cir. 1972).

In the Court's view, the public interest also requires issuance of a preliminary injunction. Few public policies are more important than protection of competition. In the instant case, as previously mentioned, the number of competitors in the vending machine market is declining. Thus the courts have a duty to vigilantly protect the remaining competition. The balance of equities also favors plaintiffs. Vendo's state judgment is protected by judgment liens and security agreements. Stoner and Stoner Investments, despite Vendo's protestations to the contrary, have substantially complied with these agreements. Vendo has already realized over $582,000 from an escrow trust agreement. If it is ultimately successful here, its only loss will be certain interest payments which the Stoner interests concededly cannot pay. On the other hand, the Stoner interests and Lektro-Vend's losses arising from denial of the preliminary injunction will be severe, as demonstrated above. See *Semmes Motors, Inc.* v. *Ford*, 429 F.2d 1197 (2d Cir. 1970).

B.

Because they seek an injunction against state court proceedings, plaintiffs are faced with a special burden. The anti-injunction statute, 28 U.S.C. § 2283, prohibits issuance of an injunction to stay proceedings, in a state court except

under three conditions: (1) when expressly authorized by an act of Congress, (2) where necessary in aid of jurisdiction, and (3) to protect or effectuate federal judgments. Moreover, the principles of comity and federalism militate against unnecessarily interfering with pending state court actions even if § 2283 is satisfied. *Mitchum* v. *Foster,* 407 U.S. 225 (1972).

There is a paucity of authority on the issue of whether the injunction provisions contained in 15 U.S.C. § 26 provide express congressional authorization to grant injunctions against state court actions. *United States* v. *Bayer,* 135 F. Supp. 65 (S.D.N.Y. 1955) indicates that express authorization is provided while *Helfenbein* v. *International Ind., Inc.,* 498 F.2d 1068 (8th Cir. 1971) states no such authority exists. The Supreme Court's decision in *Mitchum* v. *Foster, supra,* seems to clarify the issue. In *Mitchum,* a 42 U.S.C. § 1983 case, the Court held that to qualify under the "expressly authorized" exception of the anti-injunction statute, a federal law need not contain an express reference to § 2283 nor expressly authorize an injunction of a state court proceeding. To qualify as an expressly authorized exception the statute would, however, have to create

> "a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." 407 U.S. at 237.

These tests are equally applicable to antitrust actions. When Congress passed the various antitrust laws it clearly created federal rights and remedies enforceable in a federal equity court. In fact, such power was exclusively vested in the federal court system, indicating congressional approval of enjoining certain state actions, if necessary. *Cf. Lemelson* v. *Ampex,* 372 F. Supp. 708 (N.D. Ill. 1974). This Court therefore holds that these laws, in the instant case, can only be given their intended scope by staying the state court proceedings and that § 2283 authorizes an injunction here

where the state court proceedings are part of the anti-competitive scheme.

The Court also holds that § 2283 authorizes an injunction here because further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp., as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo. Vendo's offer to place the Stoner Investment and Lektro-Vend stock under control of the Court does not meet this problem because as a matter of substance Vendo would control both plaintiff and defendant, requiring dismissal under Article III. Thus the injunction is also necessary to protect the jurisdiction of the Court. Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention.[5]

C.

Since the Court has determined that a preliminary injunction should issue, the terms and conditions of the injunction must be determined. The first issue is what type of security must plaintiffs produce pursuant to F.R.Civ.P. 65(c). The amount of security required is within the sound discretion of the court and is intended to protect against such cost and damages as may be incurred by any party wrongfully restrained or enjoined. However, there is no liability for damages resulting from issuance of an injunction erroneously granted unless the suit was prosecuted maliciously and without probable cause. See 7 *Moore's Federal Practice* ¶ 65.10 at p. 98 and cases cited therein.

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[5] The findings contained herein are interlocutory in nature necessarily based on an incomplete record. Of course, a complete trial specifically directed to the issues in this case might produce evidence requiring a different or more limited result.

Because the plaintiffs have placed considerable evidence in the record demonstrating illegal anticompetitive behavior on the part of Vendo, it seems unlikely that Vendo will be able to prove any compensable damage arising from issuance of this injunction. Moreover, since this injunction will not remove the pre-existing judgment liens, Vendo remains well protected. Accordingly, a nominal bond of $2,500.00 (Twenty Five Hundred Dollars) will be required. See *Scherr* v. *Volpe,* 466 F.2d 1027 (7th Cir. 1972); *Urbain* v. *Knapp Bros. Mfg.,* 217 F.2d 810 (6th Cir. 1954).

The remaining issue concerns the scope of the preliminary injunction. Such an injunction should protect plaintiffs from harm due to collection of the state court judgment while preserving the Stoner interests' assets so that Vendo will be able to collect on the judgment if it is ultimately successful. The Court believes that these two goals can be accomplished by enjoining further collection efforts but leaving intact those portions of the state decrees (and liens) which prevent transfer of any of the Stoner assets. As previously indicated, Mr. Stoner and Stoner Investments will be required to pay all taxes, utilities and maintenance from currently collected income to preserve the assets. Plaintiffs shall prepare and present on notice a draft order in conformance with the views expressed herein within ten (10) days.

IT IS SO ORDERED

ENTERED:

/s/ R. W. MCLAREN
United States District Judge

DATED: May 29, 1975

DEFENDANT'S OBJECTIONS TO THE PROPOSED FORM OF ORDER GRANTING PRELIMINARY INJUNCTION AS SUBMITTED BY THE PLAINTIFFS

(Filed June 16, 1975)

[CAPTION OMITTED IN PRINTING]

INTRODUCTION

The Vendo Company has set forth in its brief opposing the issuance of an injunction its primary objections to the interference by the Federal Court with the valid and unimpeachable State Court judgment in the case of *Vendo* v. *Stoner and Stoner Investments,* Cause No. 65-2134, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

Not only has the Court erroneously interpreted the record and the extent of its own jurisdiction in this case, but the security which the Court would order to stand against the wrongful issuance of such an injunction is entirely too small to conform with the requirements of law.

Despite the minimal amount of security ordered by the Court, the draft injunction order proposed by the Plaintiffs would completely excuse them from any of the comparatively few responsibilities which this Court has attempted to place upon them.

While the Vendo Company is compelled to insist that the Court alter the terms of the draft injunction order to protect the pitifully small[1] security awarded, the Defendant by

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[1] The total judgment in the State Court is $7,516,335, exclusive of costs. Interest on that amount to date totals $1,732,257.22. The total debt as of the date of filing these objections would be $9,248,592. Interest on the judgment runs at the rate of $1,235.56 per day—$51.48 per hour! The bond ordered to be posted in this case would not even account for the interest which will accrue in the three days while the Court considers these objections and awaits the Plaintiffs' reply.

no means waives its overriding assertion that no injunction should be issued in any event.

I

DEFENDANT REASSERTS ITS OBJECTION THAT THE FEDERAL COURT HAS NO JURISDICTION OVER PROPERTY WHICH HAS FIRST BEEN PLACED UNDER THE CUSTODY AND CONTROL OF THE STATE COURT

Stoner Investments, Inc. and the other citation respondents in the supplementary proceedings in the State Court are presently under a specific prohibition against the further transfer of any asset belonging to the State Court judgment debtors. The State Court order reads as follows:

> "[You are] prohibited from making or allowing any transfer of or interfering with, any property not exempt from execution or garnishment belonging to the judgment debtor . . . until further order of this court." (Px 341, Citation to Stoner Investments)

Over and above the requirements of § 2283, Title 28 U.S.C., is the absolute prohibition against one court of concurrent jurisdiction from interfering with the proceedings of a sister court which has prior jurisdiction over the property involved, *Princess Lida* v. *Thompson,* 305 U.S. 456, 83 L Ed 285 (1938). The United States Supreme Court has long recognized the principle that the court which first obtains jurisdiction of property has the *exclusive* jurisdiction to proceed with respect to that property.

In our post-hearing brief (p. 34-38) we set out those facts and points of law upon which we based our argument that the issuance of an injunction in this case would wrest control from the State Court of assets, real and personal property, over which the State Court has obtained prior exclusive jurisdiction by reason of the citation prohibitions and the *voluntary acts of Stoner and Stoner Investments.* This Court has no power to interfere with that property now

being held under the *in rem* jurisdiction of the Circuit Court:

> "Where, as here, a *res* has come into the possession and under the control of a state court, one having a right to go into the the federal court . . . cannot obtain a judgment entitling him to interfere with the administration of the *res* by the court having its possession. While he may not be denied his right to prosecute an action to judgment or a suit to final decree in the federal court, such judgment or decree can do no more than adjudicate the validity and amount of his claim." [*Pufahl* v. *Parks,* 299 U.S. 225 at 226 (1936).]

And the rule that other courts may not render any judgment or decree which will interfere with the constructive possession of a court which first took possession has been followed by the Seventh Circuit in *Barrett* v. *International Underwriters, Inc.,* 346 F.2d 346 (7th Cir. 1965). There the Federal Court adjudicated the validity of certain execution liens but specifically refrained from ordering a marshall's sale of the property subject to the liens but which was in the custody of the State Court.

This rule cannot be superseded by the Federal Court's power to protect its own jurisdiction. *See* IA Moore's Federal Practice ¶¶ 0.214—0.223.

Any other rule would create "an irreconcilable conflict between the state and federal judiciaries;" *Signal Properties, Inc.* v. *Farha,* 482 F.2d 1136 (5th Cir. 1973).

We do not know whether the Court misapprehended or simply chose to ignore our arguments in this respect, for there is no consideration given to the *in rem* jurisdictional questions in the memorandum opinion.

In any case, the Court has already authorized the disbursement of funds held by the State Court so that Stoner could pay the Sidley and Austin law firm and his other attorneys. This occurred prior to the Court's decision on

the merits of injunctive relief, (p. 878—879 Feb. 14 Report of Proceedings), even though Vendo's attorneys insisted that the status of the supplemental proceedings must remain unaltered.

Later, when the Court issued its memorandum opinion, it was again clear that a primary purpose for the injunction was to allow Stoner the use of funds tied up in the State Court to prosecute this antitrust action. Presumably the Sidley and Austin firm and cocounsel for Stoner will be paid without delay, but Vendo will be prevented from receiving any further payment on the State Court judgment debt, which has been due and payable since the return of the State Court mandate December 9, 1974.

The Plaintiffs, not satisfied merely to meet the payroll for their lawyers, would seek a complete release of the *res* being held by the Circuit Court of Kane County.

Again, we must respectfully suggest that neither Sidley and Austin and associated counsel, nor the tax collector or Stoner employees or any other person has a superior claim to the funds which the State Court is holding for the sole purpose of satisfying its own judgment.

The views of the Plaintiffs and of this Court would erroneously deprive the Illinois Court of its rightful power to prevent further fraudulent transactions by Stoner and his corporation. The broad spectrum of his business misconduct, spiteful dealings and wasteful dissipation of assets reflected by the record in this Court must not be allowed to continue without security.

II

THE PROPOSED INJUNCTION ORDER WOULD COMPLETELY NULLIFY THE EFFECT OF THE STATE COURT JUDGMENT LIENS

The Vendo Company does not waive, nor has it ever waived any right that it might have under the first judg-

ment lien. The Vendo Company maintains that it has the present right to execute upon its judgment against the present holders of real estate to whom Stoner transferred his property subject to the lien prior to the execution of the Escrow Trust Agreement.

Stoner and Stoner Investments have received all of the proceeds from such sales despite the representation under oath by Stoner's attorney Barnabas F. Sears that such funds would not be released pending ultimate affirmance on appeal. Sears did not tell the truth in his sworn affidavit in this respect as can be seen from the testimony of Charles Mikula. (P. 753—Feb. 13 Rep. of Proceedings)

A contempt proceeding is presently pending in the Circuit Court as a result of the release of these real estate proceeds. If it is the intent of this Court to presently insulate the Plaintiffs and their lawyers from any inquiry into their questionable conduct, then the injunction order should specifically provide for service of notice on Judge Petersen that he is precluded from further requiring that Stoner and his corporation show cause why they should not be held in contempt for their misrepresentation to the Court.

In any case, there is no suggestion in the proposed order as to what action Vendo is to take in the event such an inquiry were resumed by the Circuit Court. Clearly the Vendo Company and its attorneys do not desire to engage in any contumacious behavior before the State Court. The failure of Vendo to participate in any state contempt proceeding for fear of further arousing the ire of this Court would subject the Defendant to possible contempt in the State Court.

With respect to the real property in question, those persons presently holding it took subject to the lien of judgment and Stoner has received all consideration due and owing on that account. There has been no finding by this Court that Vendo's effort to hold those landowners answerable to the judgment lien would have any effect upon the

jurisdiction of this Court. It is absolutely clear that if this Court must see fit also to protect persons not parties to this action, then the order should clearly so state.

III

THE INJUNCTION ORDER MAY NOT NULLIFY THE OBLIGATIONS OF STONER AND STONER INVESTMENTS AND THEIR SURETIES UNDER THE 1967 BONDS

The draft order as proposed by the Plaintiffs improperly omits any reference to the continued effect and enforcement of the bonds of Harry B. Stoner and Stoner Investments, Inc. and their sureties which were executed and approved November 7, 1967 by the Circuit Court as security for the judgment in the State Court.

On November 26, 1971 following the first appeal, Stoner's attorney, Barnabas Sears, attempted to obtain a release on the 1967 bonds. These bonds following the first appeal (Px 320, 321) were construed by the Circuit Court to have remained in full force and effect (see Dx 404, Order of Judge Petersen dated November 26, 1971).

One of the sureties on the bonds is Ann Stoner. She is not a party to the Federal litigation. Her obligation to pay on the judgment is unrelated to any antitrust claim asserted in this Court. The fact that Ann Stoner's assets may be subject to execution has no effect on the ability of the Plaintiffs to prosecute their case in this Court.

The possibility that Ann Stoner may seek indemnification from the Plaintiffs is of no consequence. Rule 65 F.R.Civ.P. clearly states that an injunction may be binding only upon parties to the action in question. If it is the intent of this Court to prevent the institution of lawsuits against Stoner by persons other than Vendo, then the order should so specify so as to forewarn those persons involved as to the restrictions placed upon them.

IV

THE PROPOSED ORDER WOULD COMPLETELY ELIMINATE THE EFFECT OF THE SECURITY AGREEMENT IN CONNECTION WITH APPEAL BONDS

The Plaintiffs in this lawsuit would completely destroy any control that the State Court has over the administration of the security agreement attached as Exhibit A to the proposed order. If it is the intention of this Court to completely hold for naught any power of the State Court to also control the disbursal of these assets, then its order should so state so that the matter might be properly appealable on that basis. Under the order as drafted at the present time, the disapproval of the State Court would bar any payment of funds held under that agreement even though this Court might approve. In any case, this Court does not have the jurisdiction to disturb or release any of the assets presently administered by the State Court under the security agreement.

V

THE FEDERAL COURT DOES NOT HAVE JURISDICTION TO DISSOLVE THE PROHIBITIONS ORDERED BY THE STATE COURT IN CONNECTION WITH THE SUPPLEMENTAL PROCEEDINGS

The proposal of the Plaintiffs under paragraph 2 of the proposed order is completely contrary to the decision of this Court in its memorandum opinion as to the effect of the state citation proceedings. The release of all assets held under any prohibitions involved in said proceedings would completely nullify their effect and if the Court wishes that result the order ought to say that. Also, the order should specifically state whether the Vendo Company will have the opportunity to approach the Circuit Court of Kane County to obtain periodic extensions of said citations which would be needed to keep them alive under State Statutes.

Sub-paragraph (b) of paragraph 3 is insufficient for the same reasons. Stoner Investments is now prohibited from transferring or using any of its accounts or checking accounts which it has anywhere in the State of Illinois or elsewhere.

The standstill agreement between each of the parties and the Court was initiated prior to the time that Stoner Investments fully disclosed the true extent of its present assets and accounts. Some disclosure should be made at this time so that this Court has knowledge of the exact amount of security or lack of it that is available due to the citation proceedings. The Court is thus far operating under the assumption that a certain amount of monies are tied up. However, at the present date no one other than the Plaintiffs knows for certain how much is involved as security. If the Court intends to specifically decline the opportunity to ascertain the exact amount of security which it says it is ordering to be posted to protect the Defendant in this case, then the order should specifically so state. Vendo requests only discovery under these supplementary proceedings and an actual turnover need not be ordered until the dissolution of the injunction.

This matter has been pending for a long period of time and discovery so as to learn of the conduct of Stoner regarding the existence or concealment of assets will expedite proceedings in both the State and Federal Courts. If it is the intention of the Court to prohibit Vendo from engaging in such discovery, the order as presently drafted does not clearly prevent it.

Further, the order is unduly vague as to any continuing responsibilities that Stoner and Stoner Investments might have under the citation proceedings. See the affidavit of Wayne F. Weiler attached to these objections. Attorney John Dreyer is Stoner's Aurora counsel. The fact that Mr. Dreyer, a former partner of Barnabas Sears, fears eviction by Stoner leads to no other reasonable inference than that Stoner wishes to evade the citation proceedings by evicting

those tenants presently prohibited from paying him and to grant leases to persons not under any restraint from the Circuit Court.

Again, the draft order is vague in this respect. Are Stoner and Stoner Investments free to engage in such conduct? Is Vendo free to resist such a sham transaction? If the State Court were to institute contempt proceedings as a result of such activities are Vendo and its agents and attorneys barred from participating in such an inquiry upon the request of the State Court? Or is this to be another of those areas in which Vendo is left to act at its own peril, free to choose between contumacy in this Court or before the State tribunal?

VI

STONER ASSETS SHOULD NOT BE SUBORDINATED TO PAY CREDITOR OTHER THAN ITS JUDGMENT CREDITOR, THE VENDO COMPANY

Sub-paragraph (c) of paragraph 3 regarding borrowing and receiving credit and paying all trade and other creditors would again allow the Stoner Investments Company to transfer assets in violation again of the prohibition of the State Court citation proceedings. Stoner Investments, Inc., according to the record in this case, is a real estate investment company. Its assets are mainly in real estate, its employees are few, and its business is solely the business of buying and selling land all of which is subject to a lien. It does not purport to have any active ongoing business other than the sale and purchase of real estate.

Further, the Defendant specifically objects to the subordination of any accounts receivable or other obligations owing to Stoner Investments by Lektro-Vend to any loans made to Lektro-Vend or on behalf of any bank or lender which might see fit to loan money to Lektro-Vend. Such a subordination is clearly in violation of the prohibition of the State Court and the citation proceedings and it should

not be allowed. The Lektro-Vend Corporation is a poor credit risk (by its own admission) and that Corporation as such has never made a profit. A subordination of the obligations due and owing by it to Stoner Investments would clearly deprive the Vendo Company of any opportunity to collect on those obligations in the event it were ultimately successful in this lawsuit.

In any case, Lektro-Vend never saw fit to become a party to the motion for preliminary injunction in the first instance. Only as an afterthought did Plaintiff's attorneys attempt to interject Lektro-Vend into the proceedings by way of their reply brief and after Vendo had no further opportunity to object. The Court's inclusion of Lektro-Vend as one of the parties to the injunction is clearly erroneous and a deprivation of due process, (unlike the amendment of the complaint by Vendo in the state case where the issue was separately briefed and argued on notice to all of the parties).

Sub-paragraph (f) of paragraph 3 of the order regarding loans to the Lektro-Vend Corporation at normal interest rates (and apparently without any security) is clearly in violation of the State Court prohibitions. As the record shows in this case, an investment in that Corporation or a loan to it would be made only by a person who wanted to take a high risk. Funds presently held for Vendo's protection should not be subject to such exploitation.

VII

VENDO SHOULD BE ALLOWED TO PROCEED WITH ITS RIGHT OF ACTION AGAINST THIRD PARTIES ACTING IN FRAUD OF CREDITORS

Further, the injunction does not make clear whether or not the Vendo Company would be able to institute actions against parties who are not Plaintiffs in this lawsuit but who are acting in fraud of creditors under the law of the State of Illinois. Such persons as David Stoner, Ann Stoner

and Ruth Netrey, among others, have been subject to the disposal of assets on the part of Harry B. Stoner and he has parted with all title to those assets for less than adequate consideration. Illinois law provides that such assets disbursed in fraud of creditors and without proper consideration is an actionable cause on the part of a judgment creditor in order to fulfill its judgment. Any State Court actions or injunctions against the further dissipation of such assets would not affect the present ability of the Plaintiffs to undertake or prosecute their antitrust claim, or to support or preserve the jurisdiction of this Court. Ann Stoner, David Stoner, Ruth Netrey, and others are not asking for any relief from this Court, and their obligations under Illinois law have nothing to do with federal antitrust law as it is at issue in this case. If the Court intends to prohibit the Vendo Company from instituting any such actions in the State Court to protect its rights under the judgment liens, the injunction order should specifically state which of the third parties involved will be insulated from suit.

VIII

PAYMENT OF ATTORNEYS' FEES, TAXES, UTILITIES OR OTHER EXPENSES FROM FUNDS HELD BY THE STATE COURT IS IMPROPER

The payment of any monies out of funds being held under the supplemental proceedings is improper. This is so even though the payments may be intended for taxes or upkeep of Stoner Investments real estate. Vendo does not consent to the release of any asset for any purpose. If the Stoner real estate becomes grossly depreciated or is sold for taxes it is by virtue of the order of this Court and not because of any act of ours.

Should the Court decide to follow the law concerning the prior *in rem* jurisdiction of the State Court, there is a possibility that Stoner's real estate would be sold for taxes. The injunction order should specify whether Vendo is

barred from participating in any tax sale proceedings in order to protect its judgment lien.

Nor does Vendo waive any of its objections to the payment of Stoner's lawyers out of funds held under the prohibition of the State Court. This Court should instead order an immediate accounting of all monies paid to the Sidley and Austin firm and Stoner's other lawyers after the institution of the supplemental proceedings. All funds improperly paid should be restored so as to comply with the terms of the State Court injunction.

Most certainly, the injunction order must be clarified as to how Mr. Baker's law firm and other counsel are to be paid if it is the Court's intent to grant them such an award. For example, there should be exact terms as to how Lektro-Vend's share of the fees are to be paid and who is to pay them. Certainly the assets of Stoner and Stoner Investments should not be released for such a purpose. The same is true of Harry B. Stoner, individually. Specific orders are also necessary to determine whether Stoner's lawyers are to be paid only for services in the Federal case or whether fees attributable to the State Court collection proceedings may also be billed and paid without restriction.

If the Court wishes to assure that the Sidley and Austin firm and Stoner's other attorneys can continue to collect attorneys' fees, then there should be a complete disclosure as to what the applicable fee arrangement is. Nothing less should be expected from Mr. Baker and his partners and their associated counsel if they are to succeed in the continued right to charge attorneys' fees—a right which will be substantially affected by the Court's determination in this proceeding.

CONCLUSION

No injunction should be issued in this case. To do so is contrary to longstanding authority.

The sheer immensity of the impact of this Court's injunction staying the State Court proceeding dictates a

draft order far more detailed than that which Plaintiffs suggest:

(1) Stoner's $95,000.00 in liquid assets will find its way into his lawyer's pockets, not Lektro-Vend's.

(2) Stoner's penal bonds and voluntary security agreement cannot be suspended. The terms of these agreements must be enforced and the continued scrutiny of this Court will be required to assure that all of the terms of that document are not violated.

(3) Stoner Investment's $200,000.00 in liquid assets will go to the same attorneys, whose right to payment has been substantially affected by the outcome of the motion for preliminary injunction.

(4) This Court would be required to sidestep the State Court's absolute prohibition against the disposal of any assets by Stoner Investments.

(5) Stoner Investment's real estate and other fixed assets will be jeopardized by reason of nonpayment of taxes—Stoner Investments has no motivation to pay because they acknowledge that a sale can only result in payment to Vendo.

(6) The possibility of third-party actions to reach assets transferred in fraud of creditors must be resolved.

(7) Every day Vendo loses another $1,235.56 in interest alone on the judgment.

(8) This Court would have to take charge of Plaintiffs' assets—administer them and supervise payouts —perhaps even get involved in securing financial support for Lektro-Vend, about which Plaintiffs so loudly complain.

(9) This Court would necessarily interfere in the State Court's right to protect its own judgment by

marshalling the assets pledged to that Court by Stoner and Stoner Investments.

Respectfully submitted,

L. M. OCHSENSCHLAGER
L. M. Ochsenschlager

WAYNE F. WEILER
Wayne F. Weiler

ATTORNEYS FOR DEFENDANT

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[CERTIFICATE OF SERVICE
OMITTED IN PRINTING]

DEFENDANT'S ADDITIONAL MEMORANDUM REGARDING PROPOSED INJUNCTION ORDER AND SUGGESTION OF PROPOSED CONSENT DECREE

(Filed June 17, 1975)

[CAPTION OMITTED IN PRINTING]

Defendant's objections to the form of injunction order proposed by Plaintiffs are already on file with the Court. The Vendo Company, however, has always been willing to enter into an agreement which would completely avoid any takeover of the Plaintiffs in this case which might subsequently deprive this Court of its jurisdiction.

The Court already has our letter of January 28, 1975, whereby Vendo offered to divest or place under Court control any stock in Stoner Investments or Lektro-Vend which might be subject to collection. Prior to the Memorandum Opinion issued by the Court no response or suggestion in relation to that offer was received from either the Plaintiffs or this Court.

However, as can be seen from the Court's own comments, the Court's desire to prevent any execution upon the stock of the two Plaintiff corporations so as to preserve its own jurisdiction is the primary reason for Federal Court intervention in the State Court proceedings:

> "The Court also holds that § 2283 authorizes an injunction here because further collection efforts would eliminate two plaintiffs, Stoner Investments, Inc. and Lektro-Vend Corp. as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo. Vendo's offer to place the Stoner Investments and Lektro-Vend stock under control of the Court does not meet this problem, because as a matter of substance Vendo would control both plaintiff and defendant requiring dismissal under Article III." (Mem. Op. p. 23)

Vendo has never had any desire or intention to control or acquire Stoner Investments or Lektro-Vend Corporation. The Defendant's only intention is and always has been to satisfy its State Court judgment. That goal can be accomplished without destroying any case or controversy before this Court.

In support of Defendant's contention that it is not now and never has been interested in acquiring Lektro-Vend or in defeating this Court's jurisdiction by obtaining control over any of the Plaintiffs, Vendo offers to enter into a consent injunction decree so as to resolve the preliminary injunction issue now before the Court. Vendo will agree to a form of order as follows:

1. Vendo will not acquire or attempt to acquire directly or indirectly any of the capital or preferred stock of Lektro-Vend Corporation.

2. Vendo will not acquire or attempt to acquire any of the stock of Stoner Investments, Inc.

3. Vendo will not levy or execute upon any account receivable, note or other obligation in existence prior to January 14, 1975, including interest thereon owing to Stoner Investments by Lektro-Vend Corp. and Vendo shall cause such obligation to be exempt from any State Court proceedings to satisfy its judgment in Vendo v. Stoner, Cause No. 65-2134 in the Circuit Court for Kane County, Illinois.

4. Stoner Investments, Inc. may agree with any bank to completely cancel or subordinate any accounts receivable, notes or obligations which were in existence prior to January 14, 1975, including interest thereon owing to Stoner Investments, Inc. by Lektro-Vend Corp. to any loans to Lektro-Vend Corp. by such bank or other lender.

5. This consent decree shall remain in full force and effect until the final determination on the merits of this cause and thereafter Vendo shall take no action contrary to the terms of this consent decree without the prior consent and approval of this Court.

The above offer is made as a good faith effort to resolve any question relating to the preservation of this Court's jurisdiction. No Federal Court intervention in State proceedings would be required if the terms suggested above were taken to constitute the injunction order in this cause. The Vendo Company respectfully requests that its proposed consent decree be accepted in lieu of the injunction order suggested by Stoner and Stoner Investments to this Court.

L. M. Ochsenschlager
L. M. Ochsenschlager

Wayne F. Weiler
Wayne F. Weiler

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[CERTIFICATE OF SERVICE
OMITTED IN PRINTING]

Transcript of Proceeding Before the Honorable Richard W. McLaren on June 19, 1975 at 10:05 A.M.

[CAPTION OMITTED IN PRINTING]

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[24] MR. OCHSENSCHLAGER: How would you like to have us proceed, in what order, your Honor?

THE COURT: Well, the plaintiffs suggested the form of order. I think that perhaps the best way to proceed would be for you to address yourself to any of the points that you particularly want to make with regard to changes in that order and provisions that you think, reserving [25] all of your rights, of course, provisions that you think should be in it.

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[39] • • • • •

[MR. OCHSENSCHLAGER]: And when we think about the fact that this petition for injunction has been in this court now for ten years, and they wait until this is all over, until this injunction is entered, when if there was anything wrong with the prosecution of this case, they certainly had the duty to come in and stop it, if this Court had a right to do it and a desire and an inclination to do it, long before all the time, effort, and money were put forth in the trial in the State Court case. I know your Honor—

THE COURT: Now, wait a minute.

MR. OCHSENSCHLAGER: Now I know your Honor—

THE COURT: Just a moment.

MR. OCHSENSCHLAGER: Yes, your Honor.

THE COURT: As I understood this matter—and I think that I drew it as part of my original allotment back

in 1972—I had a pretrial conference with you gentlemen, and it was my understanding from your side as well as theirs that the cases were related in the state and here, but that it had been more or less agreed that the state case would go forward, and that when that was [40] completed, we would try the case here. We put this case off a great many times after various status reports and even some further pretrial conferences.

Now, certainly, I can't believe that it was in your mind that you would win the State Court case and then collect every penny they had and see that this case didn't get tried, or to prevent, in other words, the other half of the litigation being finished.

MR. OCHSENSCHLAGER: Well, your Honor, I worked with every ounce of strength I have to move the State Court case along where I was plaintiff. I feel that if they were sincere in their desires for injunctive relief, they would have done the same thing on their case. The injunction part they let go. The trial on the merits, maybe—I certainly didn't oppose it.

THE COURT: Are you saying now you didn't agree to this procedure?

MR. OCHSENSCHLAGER: I did not agree to this procedure, no. At one stage, the case was set for hearing. I will say I didn't oppose this if that is what they wanted to do. And the remarks are all in there. There will be some where I said: This makes some sense if this is what the Court wants to do. One time, the Court set it for trial, and we were to come in here and go to trial. But [41] you must also, if I may mention—

THE COURT: I think we set it for a final pretrial, at which time there was to be a completion or a supplementation of the prior discovery, and then we were going to go ahead and try it because it looked like the state case was going to go on forever. And I never understood you

to raise any question but that we were letting the State Court case go first, and then this one would go to trial.

MR. OCHSENSCHLAGER: Not as to the injunction. They should have gone ahead with that. In all of the cases we have read and researched, this always goes in at the start. When you want injunctive relief, go in in that instance, and most of these cases come up on that where they stop the State Court proceedings before it gets to a judgment stage, and that is the way this should have been done, and they should have done it. I didn't have the strength to run both cases.

THE COURT: This is a treble damage case, and I am talking about a trial of the treble damage case.

MR. OCHSENSCHLAGER: I think it was incumbent upon them to move it ahead, and I want to say further, Judge, the issue, one of the issues, a very important one which apparently from your Footnote 4, you must have lost track [42] of, but I am sure your Honor is aware of the fact that they had as a special defense in the State Court their federal antitrust violation as a special defense in the State Court.

THE COURT: They chose to file it here, and it was remanded there.

MR. OCHSENSCHLAGER: That is the whole story, Judge, if I might conclude.

The judge in the trial court sustained our motion to strike that special defense. Judge Seidenfeld in the Appellate Court said the trial judge was wrong, and reinstated it. We were prepared to go to trial on remand on the defense of that state case with a special defense of federal antitrust involvement, and within a week or a few days before the case went to trial, they came in, Stoner and Stoner Investments, came in of their own volition and voluntarily struck from that case their defense of federal antitrust as a voluntary act of their own. So the remarks in Footnote

4 are not entirely correct. They did have an opportunity. They did have a forum. They chose to ignore it, and chose to dismiss it. This is where we would have had an exposure to the federal antitrust case that may have ended everything if they had left it in. If they are right now, they would [43] have been right then, and they would have had a complete determination of their case at that time so far as the so-called harassment of the State Court litigation that was won completely is concerned.

THE COURT: Well, you had a chance as plaintiff to select your forum for the charges you made, I think that they had an equal right to choose their forum for the charges that they made.

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[55] • • • • •

[MR. BAKER]: Would your Honor like me to answer any of the circumstances of why this case was continued beyond just [56] saying it is obvious to me that unless the judge was going to force us to trial here, that the outcome of the state case, if it were favorable to us, would make this what you might almost call a "shoo-in" under the antitrust laws where, as we often stated in this Court, it is a new ball game if the State Court is in first. So that while we still had a good opportunity of winning in the State Court case, it seemed such an unnecessary waste of time and man power to come in here and try a case under the antitrust laws when there was still a chance that the State Court might hold the covenants invalid. I mean, beyond that, I couldn't—

THE COURT: I understood that the parties had agreed and that Mr. Ochsenschlager was in entire agreement that there would not be any effort, that it would be an undue burden on both sides, to try to carry on both suits concurrently. I certainly would not have held off for three years on the trial of the case before me if I had known that there was any question in his mind that somehow the plaintiff

here is waiving any rights by continuing the matter, and the Court was in some way giving the defendant an advantage by letting it proceed in the state proceeding and holding the matter up here. It was my understanding that both sides agreed that it would [be] a physical impossibility, [57] in effect, to carry on both cases at once, and it was agreed that the state case would go first, and that this case would go thereafter if there were any charges left to try, and I didn't think that there was anything in anybody's mind to the contrary. After all of this time and after all of the numbers of times that we have had status reports, it comes as a very severe shock to me, and I must say that I am very disappointed and very chagrined that I didn't simply force this case to go ahead along with other cases.

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[62] • • • • •

THE COURT: Well, I thank you gentlemen for your presentations. I think you both understand, both sides, that what I intend is that we have a kind of a standstill agreement here that prevents the collection of this judgment in the State Court which, if the complaint is established, could very well be claimed as part of the fruits of the violation by the defendant of the antitrust laws.

I intend simply that in effect we have a standstill agreement, or order, rather, under which the parties can go along in the normal course of business, that, certainly, there will be a prohibition against any dissipation of assets or any transferring in fraud to creditors in the event that the state judgment is ultimately enforced, and I think that we are going to have an order of some specificity that, as Mr. Ochsenschlager mentioned, pretty well informs the parties what they are and what they are not allowed to do.

• • • • •

[64] • • • • •

THE COURT: Well, I should like to have it at least by the first of the week. It will take a few days to sort this

out now and to put the order that the Court will issue into shape, taking into account the recommendations and objections of both sides as well as the discussion and undertakings, more or less, that have been made [65] on the record here today. I think that I will set next Friday for the further date in this and the date when the order will issue.

I will expect that the standstill agreement that we have had to this point during this injunction question will continue until that time.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, **HARRY B. STONER** and **STONER INVESTMENTS, INC.**, a Delaware corporation, **Plaintiffs,** v. **THE VENDO COMPANY**, a Missouri corporation, **Defendant.**	**No. 65 C 1755**

ORDER GRANTING PRELIMINARY INJUNCTION

[Entered June 27, 1975]

THIS CAUSE COMING ON FOR HEARING on plaintiffs' motion for a preliminary injunction and the Court having considered the pleadings, the record, the evidence and argument and the post-trial briefs submitted by the parties, and the Court having made its findings of fact and conclusions of law, as more particularly appear in its Memorandum Opinion and Order dated May 29, 1975; and

IT APPEARING TO THE COURT:

1. That the plaintiffs have demonstrated likelihood of ultimately prevailing on the merits of their claims under Section 1 and Section 2 of the Sherman Act, as alleged in Count I of the Amended and Supplemental Complaint;

2. That the balance of equities favors plaintiffs in that the harm to defendant from the issuance of the preliminary injunction will be slight, whereas denial thereof would result in severe loss to plaintiffs;

3. That plaintiffs will suffer irreparable harm if a preliminary injunction is not granted in that the continued action of the defendant in collecting its state court judgments, hereinafter enjoined: (a) will prevent LEKTRO-VEND from marketing a promising, newly-developed vending machine, and put insurmountable barriers in the way of its raising capital necessary to the prosecution of its business; (b) will effectively place STONER INVESTMENTS, INC. and LEKTRO-VEND CORP. under the control of defendant, which would require dismissal of the action under Article III of the Constitution of the United States as to said plaintiffs; and (c) will severely limit the ability of the individual plaintiff effectively to prosecute this action;

4. That the public interest in protection of competition requires the issuance of a preliminary injunction; that the paramount national interest requires court intervention by a preliminary injunction herein; that the failure to issue such injunction will deprive the Court of full and effective jurisdiction of the said federal antitrust claims set forth in Count I of the Amended and Supplemental Complaint and will impair, obstruct, or render fruitless the Court's determination of said claims; and that a preliminary injunction as provided herein is necessary to protect the jurisdiction of this Court; and

The Court being sufficient advised in the premises, IT IS ORDERED:

1. That the liens of those certain judgments in the amounts of $170,835 and $7,345,000, plus costs of suit, entered on August 13, 1971, in the cause entitled *The Vendo Co.* v. *Harry B. Stoner and Stoner Investments, Inc.*, General No. 65-2134, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, and the two Bonds and the Security Agreement In Connection With Appeal Bonds, which Bonds and Agreement were dated and were

approved December 14, 1971, by the Honorable John S. Peterson, Circuit Judge, and which were entered into in connection with said judgments, remain in full force and effect. A copy of said Security Agreement is attached hereto and marked Exhibit A, and the parties thereto shall abide by the terms thereof, except that where said Security Agreement requires or permits application to the Court, such application shall hereafter be made to this Court. In order to preserve said assets subject to said judgment liens while this injunction is in force, HARRY B. STONER and STONER INVESTMENTS, INC. shall pay all taxes on, and bills for utilities and maintenance of said assets, including insurance presently covering said assets, from currently collected income.

2. That the enforcement of those certain supplementary Proceedings to Discover Assets Citations which defendant, THE VENDO COMPANY, has caused to be issued in connection with said state court judgments, namely:

Respondent	Date Issued
Chicago Title & Trust Co.	December 20, 1974
Stoner Investment, Inc.	January 3, 1975
Valley National Bank	January 3, 1975
Dreyer, Foote & Streit Assoc.	January 21, 1975
Harry B. Stoner	January , 1975
Clifford Zabka	January 21, 1975

be and they are hereby stayed, provided, however, that VENDO may apply to the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, from time to time, for periodic extensions of said Citations, in order to prevent the automatic termination thereof, as provided by Illinois Supreme Court Rule 277(f), and plaintiffs may not object to such applications. All assets of STONER and STONER INVESTMENTS, INC. attached as the result of said Citations are released to the extent that STONER and STONER INVESTMENTS, INC. may collect all rent, interest, dividends, salaries, bank deposits, or other amounts due and owing

to them from the entities and persons named in said Citations.

3. Nothing in said Security Agreement shall preclude STONER INVESTMENTS, INC., in the ordinary course of business, from:

(a) collecting rents, interest, dividends and other income deriving from its assets for use as funds for payment of taxes, maintenance, insurance, and utilities so as to conserve and protect its assets;

(b) opening, maintaining, and using checking and savings accounts in any federally or state chartered bank in Illinois (STONER INVESTMENTS shall give notice to defendant of the establishment of any new account).

(c) paying all trade and other creditors' obligations incurred in the ordinary course of business;

(d) paying to its employees, excepting HARRY B. STONER, their ordinary salaries and wages;

(e) agreeing with any bank to completely cancel or subordinate any accounts receivable, notes or obligations which were in existence prior to January 14, 1975, including interest thereon, owing to STONER INVESTMENTS, INC. by LEKTRO-VEND CORP., to any loans to LEKTRO-VEND CORP. by such bank or other lender.

4. Plaintiffs shall be authorized to pay their reasonable attorneys fees for services and expenses in this case, but plaintiffs may not make payments therefor prior to the rendering of such services or the incurring of such expenses, and this Court's approval shall be required before any such fees or expenses are paid.

5. This order shall not be construed to prevent defendant or its agents or attorneys from participating in any pending contempt proceedings in Kane County, Illinois Circuit Court, provided that such participation is required by that Court and that the Kane County Court determines to proceed *sua sponte* with that action.

6. Until otherwise ordered by this Court, the defendant, THE VENDO COMPANY, its agents, servants, employees and attorneys, and all persons in active concert or participation with them, are enjoined from taking any further steps to enforce or collect, or attempt to enforce or collect, or commence or prosecute any related or supplementary actions or proceedings with regard to those certain judgments in the amount of $170,835 and $7,345,500, plus costs of suit, entered on August 13, 1971, in the cause entitled *The Vendo Company* v. *Harry B. Stoner and Stoner Investments, Inc.*, General No. 65-2134, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

7. Plaintiffs shall not dissipate any assets which may be subject to the above-described judgments and they shall make no expenditures or investments out of the ordinary course without Court approval.

IT IS, THEREFORE, FURTHER ORDERED that upon filing by plaintiffs of an undertaking in the sum of Twenty-Five Hundred Dollars ($2,500.00), in the form of a surety bond, or bond secured by the deposit of that sum in cash with the Clerk of this Court, for the payment of such costs and damages as may be incurred or suffered by defendant if it is found to have been wrongfully enjoined, there issue out of this Court, under the seal thereof, a Writ of Preliminary Injunction, restricting said defendant, its agents, servants, employees and attorneys and all persons in active concert or participation with them, from doing any of the facts prohibited herein, unless otherwise ordered by this Court.

ENTERED:

R. W. McLAREN
United States District Judge

DATED: June 27, 1975

Exhibit A to Order Granting Preliminary Injunction

APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE
CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

THE VENDO COMPANY, **Plaintiff-Appellee,** **vs.** **HARRY B. STONER and STONER INVESTMENTS, INC.,** **Defendants-Appellants.**	**No. 65. C-2134**

SECURITY AGREEMENT IN CONNECTION WITH APPEAL BONDS

AGREEMENT between HARRY B. STONER, ANN M. STONER and STONER INVESTMENTS, INC.

WHEREAS, on August 13, 1971, the Court entered judgments in this case against the defendant, HARRY B. STONER, individually, and against defendants HARRY B. STONER and STONER INVESTMENTS, INC.; and,

WHEREAS, Notice of Appeal from said judgments was filed in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, on November 3, 1971; and,

WHEREAS, HARRY B. STONER, individually and STONER INVESTMENTS, INC. have executed appeal bonds in connection with their appeal of said judgments; and,

WHEREAS, said Defendants-Appellants are unable to provide a surety company bond or schedule real or personal property as security for said bonds, yet are of the opinion

that they have good and meritorious grounds for appeal of said judgments; and,

WHEREAS, it is to the mutual benefit of the parties that this Security Agreement be executed by the Appellants to secure the Appellee and in order to permit the prosecution of said appeal without undue burden on the Appellants and without unduly jeopardizing the rights of Appellee to collect said judgments, if they are affirmed.

NOW, THEREFORE, IT IS AGREED between HARRY B. STONER and ANN M. STONER, as shareholders, directors and officers of STONER INVESTMENTS, INC., and by STONER INVESTMENTS, INC.:

1. HARRY B. STONER and ANN M. STONER represent that they are the sole stockholders of STONER INVESTMENTS, INC., holding 245 shares and 155 shares, respectively, which shares are all of the stock issued and outstanding of an authorized issue of 1,000 shares; that HARRY B. STONER is President and ANN M. STONER is Assistant Secretary of STONER INVESTMENTS, INC. and, together, they comprise two of the three member Board of Directors.

2. HARRY B. STONER and ANN M. STONER represent they are duly authorized to execute this Agreement for and on behalf of STONER INVESTMENTS, INC.; that the balance sheet for the year ended December 31, 1968 and the balance sheet as of September 30, 1971, attached hereto as Exhibits A and B, fairly reflect the financial condition of STONER INVESTMENTS, INC. as of the dates stated. No material adverse change has since occurred.

3. HARRY B. STONER and ANN M. STONER hereby represent that STONER INVESTMENTS, INC. has made no investments in, advances to or guarantees of the obligations of any company, individual, or other entity, except those disclosed in said balance sheets.

4. HARRY B. STONER and ANN M. STONER agree that as a condition of the Court's approval of the said Appeal Bonds

signed by said STONER INVESTMENTS, INC. and HARRY B. STONER that during the term of said bonds, less otherwise permitted by order of court, upon notice to plaintiff, and for good cause shown:

(a) They will continue to act in their said capacity as officers and directors of STONER INVESTMENTS, INC.

(b) Will not transfer or sell any of said shares of stock now owned by them; and

(c) Will not permit the issuance of any additional stock of STONER INVESTMENTS, INC., or an increase in the membership of its Board of Directors.

5. STONER INVESTMENTS, INC., during the term of said bond, except as permitted by order of court, upon notice to plaintiff, and for good cause shown, will not:

(a) Sell or dispose of any of its assets below the fair value thereof.

(b) Purchase any shares of its stock.

(c) Declare or pay any dividends, except as required by good business or in order to prevent possible adverse tax consequences, if a dividend were not declared.

(d) Become a party to any merger or consolidation with any other company.

(e) Increase the aggregate compensation of its officers or directors in any fiscal year more than ten per cent (10%) above the compensation paid during the preceding fiscal year; and

(f) Make any material change in the management of STONER INVESTMENTS, INC. or conduct its business other than in a good and businesslike manner.

6. Promptly after approval of this Security Agreement and the appeal bonds to which it is related, by the Circuit

Court of Kane County or by the Appellate Court of Illinois for the Second District or by the Supreme Court of Illinois, STONER INVESTMENTS, INC. will cause the trustees of all the land trusts of which STONER INVESTMENTS, INC. is the beneficial owner, to convey all the lands held by such trusts to STONER INVESTMENTS, INC. and the lien of said judgments will attach thereto.

7. STONER INVESTMENTS, INC. will enter into an Escrow Agreement with The Chicago Title and Trust Company, satisfactory to that company, which will provide for the deposit with The Chicago Title and Trust Company of the net proceeds of the sale of real estate sold by STONER INVESTMENTS, INC., or by any land trust of which STONER INVESTMENTS, INC. is the beneficial owner, which proceeds may be invested by The Chicago Title and Trust Company and which investments shall be held by Chicago Title and Trust Company and the income thereon accrued and added to the fund. The Escrow Agreement shall also provide that a portion of the net proceeds (not to exceed, in any one year, the lesser of (a) $15,000, or, (b) the net proceeds deposited in that year), of sales of real estate so deposited are to be paid by The Chicago Title and Trust Company to STONER INVESTMENTS, INC. to reimburse STONER INVESTMENTS, INC. for real property taxes, interest, penalties and costs levied and paid on unimproved property held directly or indirectly by STONER INVESTMENTS, INC.

8. Defendants have made a disclosure of the terms of a certain lease entered into between Merchants National Bank, as Trustee under Trust No. 1824, and Stoner Shopping Center, Inc., dated May 1, 1971, by furnishing VENDO with a copy thereof, but nothing in this Security Agreement shall be construed as denying VENDO the right to claim that Defendants have a property interest in Stoner Shopping Center, Inc.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement as of the 14th day of December, 1971, to become

effective upon the approval thereof by the Circuit Court of Kane County.

HARRY B. STONER
Harry B. Stoner

ANN M. STONER
Ann M. Stoner

STONER INVESTMENTS, INC.

By HARRY B. STONER,
Harry B. Stoner,
President

Attest:

ANN M. STONER
Ann M. Stoner
Asst. Secretary

Taken and approved by me this 14th day of December, 1971.

JOHN B. PETERSEN
Circuit Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 75-1792 and 75-1793

LEKTRO-VEND CORPORATION, a Delaware corporation; HARRY B. STONER; and STONER INVESTMENTS, INC., a Delaware corporation,

Plaintiffs-Appellees,

v.

THE VENDO COMPANY, a Missouri corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 65 C 1755
RICHARD W. MCLAREN, *Judge.*

ARGUED DECEMBER 8, 1975 — DECIDED MAY 28, 1976

Before SWYGERT and SPRECHER, *Circuit Judges,* and WARREN, *District Judge.*[1]

SWYGERT, *Circuit Judge.* The overall question is whether the district court properly issued a preliminary injunc-

[1] The Honorable Robert W. Warren, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

tion in this antitrust case, thereby staying enforcement proceedings in the Illinois state courts to collect two judgments entered in a suit on an employment contract that contained a noncompetition covenant. Among the specific issues raised is whether section 16 of the Clayton Act, 15 U.S.C. § 26, comes within the "expressly authorized" exception of the anti-injunction statute, 28 U.S.C. § 2283. We hold that it does. We also hold that the district judge did not abuse his discretion in finding the plaintiffs have a likelihood of success on the merits and they would suffer irreparable injury absent an injunction. We therefore affirm the district court's grant of a preliminary injunction.

The Vendo Company is located in Kansas City, Missouri. In 1959 it was a leading manufacturer and seller of vending machines for cold beverages, ice cream, and certain other products. It did not manufacture vending machines for ~~ice cream~~, candy, cigarettes, sandwiches, or coffee, but was conducting research and development in that area.

Stoner Manufacturing Company, located in Aurora, Illinois, was principally engaged in the manufacture of candy vending machines that had a nationwide market. Compared with Vendo it was a smaller and less diversified enterprise. Harry B. Stoner, his wife, and other members of his family owned all of the Stoner Manufacturing stock. Stoner was the president and controlled the company.

Following negotiations with Stoner, Vendo purchased the assets of Stoner Manufacturing Corporation in April 1959 with the exception of its real estate and buildings. (Upon consummation of the purchase, Stoner Manufacturing was reorganized as Stoner Investments, Inc.) The sales agreement imposed a ten-year noncompetition restriction on Stoner Manufacturing not to own, control, or manage any business engaged in the manufacture or sale

of vending machines. In addition, an employment contract between Vendo and Harry B. Stoner was executed whereby the latter would serve Vendo as a consultant for five years at an annual salary of $50,000. This contract had a noncompetition covenant also. Stoner agreed that during the term of the contract and for five years following the termination of his employment he would not "[D]irectly or indirectly, in any of the territories in which the Company [Vendo] . . . is at present conducting business and also in territories which Stoner knows the Company . . . intends to extend and carry on business . . ." enter into the vending manufacturing business. The employment contract provided that Stoner "[S]hould regulate his own hours of employment and shall determine the amount of time and effort he shall devote . . ." to Vendo.[2]

Almost immediately after the Stoner Manufacturing assets were acquired by Vendo, friction developed between

[2] The full text of the noncompetition clause reads:

5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or saleman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter.

Stoner and his employer. Stoner complained that his services as a consultant were not being utilized and that he was being treated as a mere figurehead. Very likely this state of affairs prompted the development of the events that lead to the litigation in both the state and federal courts.

For several years before the sale to Vendo, Rod Phillips was the Stoner plant superintendent and his son, Bill, the assistant superintendent. Because of their disagreement with the policies and operations of Vendo, the father and the son resigned from their respective positions in mid-1960. Bill Phillips after quitting Vendo began the design of an electronic coin detecting device and attempted to interest Stoner in financing its development. Stoner evinced interest and agreed to pay the younger Phillips $650 per month to develop the device. It was agreed that any patents on the invention would belong to Stoner Investments. By the end of 1960 a model was completed and a patent applied for. The patent was issued in October 1960 and was assigned to Stoner Investments; however, the patented device was never produced commercially.

About this same time Rod and Bill Phillips developed a machine for vending candy that was radically different from any previous machine. It combined in a novel yet practical design three existing vending machine features: stock rotation (known as "first-in, first-out"), a window to display the product to be vended, and a capacity for stocking mixed items in a single conveyance.[3] At Rod

[3] In 1959 when Stoner Manufacturing sold out to Vendo it was manufacturing a candy vending machine called a "drop shelf" machine. The Phillip's machine, which became known as the "Lektro-Vend" model, was an extension of the "drop shelf" model. After the purchase of the Stoner assets in April 1959, Vendo began experimenting with the same idea as that developed by the Phillipses. Two models were built. Vendo, however, considered the models defective in certain mechanical respects and too expensive to produce. The project was dropped.

Phillips's request Stoner agreed to finance the development of this new machine; however, neither Stoner nor Stoner Investments was to have any ownership or control over the venture. Interest-free loans aggregating $200,000 were made by Stoner to the Phillipses during 1961-62. Stoner also made available a building in Aurora rent free.

By October 1962 prototypes of the machine developed by Rod and Bill Phillips had been constructed and were exhibited at a trade show in San Francisco. The machine won favorable interest in the industry. In the meantime Lektro-Vend Corporation had been organized. The original stockholders were Rod and Bill Phillips, Ruth Netray (Stoner's sister-in-law), and several employees of the corporation.

In December 1962 Mrs. Netray loaned the Phillipses $350,000. The loan was later increased to $525,000. The proceeds of those borrowings were used in part to pay off the $200,000 loan made by Stoner. During that same month Stoner asked Vendo to be released from his employment contract, saying that he had an opportunity to invest in the Lektro-Vend venture. Vendo refused to accede to his request and Stoner was told that Vendo itself was interested in buying the Lektro-Vend machine. Stoner was asked to learn whether Rod Phillips was interested in selling and, if so, to arrange a meeting between Phillips and representatives of Vendo. Stoner reported that Rod Phillips was asking $1,500,000.

Rod Phillips met with certain Vendo officials in January 1963 to show them the operation of the machine. Stoner was present, but took no part in the meeting. In March Stoner wrote Vendo's vice-president that he had told Phillips that he assumed in the absence of any word from Vendo that Vendo no longer had any interest in the patent. The vice-president responded that Vendo was still interested, but that the asking price was too high.

During the summer of 1963 Stoner had a conversation with Vendo's president. Upon inquiry from the latter as to the actual extent of Stoner's involvement with Phillips, Stoner said that his relationship was confined to loans which had been repaid by another person. He did not disclose that the other person was his sister-in-law.

In March 1964 Stoner Investments contracted to sell Lektro-Vend a new plant which had been built in Aurora by Stoner Investments during the previous year. The deal was financed through a bank loan which was subject to an agreement that Stoner Investments would repurchase the property in the event of default.

Stoner's contract of employment terminated June 1, 1964. During that same month Lektro-Vend issued 5,000 shares of stock to Mrs. Stoner and in July it issued 5,000 shares of stock to Stoner Investments. Stoner sent a letter to fifty vending machine operators in which he identified himself with the old Stoner Manufacturing Company and said that he was now interested in Lektro-Vend. He went to great lengths to recommend the Lektro-Vend product. Litigation soon followed.

Vendo sued Stoner and Stoner Investments in the Illinois state court in August 1965. In October 1965 Lektro-Vend, Stoner, and Stoner Investments sued Vendo in the federal court. The action in the state court was finally terminated in November 1974 when the Illinois Supreme Court denied a petition for rehearing of its decision affirming judgments against Stoner and Stoner Investments, Inc. in excess of $7,000,000.[4]

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[4] In an attempt to aid the reader to better understand this complex litigation and at the same time to shorten the opinion, a summary of the state court litigation follows.

Vendo v. *Harry B. Stoner and Stoner Investments, Inc.*

The suit was filed in Kane County, Illinois on August 10, 1965; the complaint charged breach of noncompetition covenants; an

The complaint in the federal action alleged violations by Vendo of sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). The case lay dormant until June 1975 when the district court granted plaintiffs' motion for a preliminary injunction staying defendant's efforts to collect its state court judgments until the merits of the federal suit could be determined. That action precipitated the present appeal under the provisions of 28 U.S.C. § 1292(a).

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[4] (Continued)
amended complaint also charged theft of trade secrets. After a bench trial the court on December 16, 1966 found for Vendo. Judgments against Stoner for $250,000 and against both defendants for $1,100,000 were granted. Stoner and Stoner Investments were enjoined from further acts of competition.

An appeal was taken to the Appellate Court of Illinois. That court entered its decision on January 30, 1969, 105 Ill. App. 2d 261. The court held that no trade secrets were involved, the noncompetition covenants were valid and enforceable, and the covenants had been breached by the defendants. The grant of injunctive relief was affirmed. The court also held that though the trial court erred in striking the affirmative defense based on the federal antitrust laws, it was correct in denying the defense based on the Illinois antitrust laws. The cause was remanded for a determination of damages and further proceedings.

Upon remand the defendant withdrew its affirmative defense asserted under the federal antitrust laws. The trial court, after hearing evidence, entered judgments against Stoner and Stoner Investments which totaled $7,363,500.

Upon a second appeal to the Illinois Appellate Court, the court decided, on September 12, 1973, 13 Ill. App. 3d 291, that the trial court erred in the measurement of damages. The case was remanded for assessment of damages in accordance with the Appellate Court's original opinion.

Upon appeal to the Illinois Supreme Court on September 27, 1974, 58 Ill. 2d 289, the appellate court was reversed and the trial court's judgments were affirmed. The Supreme Court in deciding the case constructed a different theory of recovery—the breach of a fiduciary obligation on the part of Stoner—than had been asserted by Vendo.

I

The threshold question relates to the authority of a federal court to enjoin a proceeding pending in a state court. Specifically, the question is whether section 2283 of the Judicial Code[5] prevented the district court from issuing a preliminary injunction staying the efforts of Vendo to collect its state court judgments against Stoner and Stoner Investments, Inc.[6]

The underlying purpose of this section, grounded in federalism is "[T]o prevent friction between state and federal courts." *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940). The statute is to be strictly applied *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511, 515-16 (1955). Unless one of the three exceptions listed in the statute is evident, it constitutes an absolute ban upon a federal court injunction against a pending state court proceeding. *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87 (1970).

In the instant case the district court held that both the "as expressly authorized" exception and the "in aid of its jurisdiction" exception applied and issued the preliminary injunction. Since we are of the view that the judge was correct in holding the first exception applicable, we need not reach the question raised as to the second exception.

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[5] 28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[6] The injunction preserved Vendo's lien and rights under the state court judgments. It also contained detailed provisions regulating the conduct of the judgment debtors during the pendency of the injunction.

Section 16 of the Clayton Act (15 U.S.C. § 26) provides that any person is entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage from violations of the antitrust laws. The complaint in the instant case alleges violations of sections 7 and 2 of the Sherman Act (15 U.S.C. §§ 7 and 2) and reads in part:

> On or about August 10, 1965, Vendo filed suit in the Circuit Court for the Sixteenth Judicial Circuit of Illinois against Stoner and Stoner Investments. The full text of the complaint is attached to this complaint as Exhibit C. The complaint alleges that Stoner had breached his agreement not to compete of June 1, 1959 and that Stoner Investments had breached that portion of the April 3, 1959 contract of sale which sought to eliminate competition for 10 years throughout the world. As has been previously alleged, the world-wide non-competition covenants contained in the said contracts are illegal and in violation of the antitrust laws of the United States, particularly Sections 1 and 2 of the Sherman Act. The purpose of the said law suit is to unlawfully harass Stoner and Stoner Investments and to eliminate the competition of Stoner, Stoner Investments and Lektro-Vend. The lawsuit is part of Vendo's plan to monopolize the vending machine manufacturing business. The threats to enforce such non-competition covenants and the bringing of a suit in an attempt to enforce the illegal covenants are overt acts of Vendo in monopolization and constitute an attempt to monopolize the trade or commerce in the State of Illinois among the several states and foreign countries in the manufacture of such vending machines. Lektro-Vend, Stoner and Stoner Investments have been injured in their business and property as a direct and proximate result of these overt acts of Vendo.[7]

[7] Other allegations specifically refer to the noncompetition covenants contained in the 1959 agreements.

The question before us is whether section 16 of the Clayton Act, 15 U.S.C. § 26, should be interpreted as coming within the "expressly authorized" provision of section 2283 of the Judicial Code.

The Supreme Court's decision in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), provides guidance. In that case the Court held section 7 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, came within the meaning of the "expressly authorized" exception of the anti-injunction statute. The Court initially noted that, "Despite the seemingly uncompromising language of the anti-injunction statute prior to 1948, [it was] soon recognized that exceptions must be made to its blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope." *Id.* at 233-34. The court also cataloged six separate instances in which it had found federal courts empowered to enjoin state court proceedings in carrying out the will of Congress "despite the anti-injunction statute." Mr. Justice Stewart observed that "[i]n addition to the exceptions to the anti-injunction statute found to be embodied in the various Acts of Congress, the Court [has] recognized other 'implied' exceptions to the blanket prohibition of the anti-injunction statute." *Id.* at 235. The relevant criteria to be applied in determining whether an Act of Congress comes within the "expressly authorized" exception were listed: (1) The "federal law need not contain an express reference" to the anti-injunction statute; (2) "[A] federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception"; and (3) "[A]n Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Id.* at 237. Summarizing these criteria, Mr. Justice Stewart wrote: "The test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of

equity, could be given its intended scope only by a stay of a state court proceeding." *Id.* at 238.

Applying these criteria to section 16 of the Clayton Act, we are of the view that it falls within the "expressly authorized" exception. *Mitchum* noted that section 1983 of the Civil Rights Act "opened the federal courts to private citizens, offering a uniquely federal remedy" in vindicating basic federal rights. *Id.* at 239. So, too, does section 16 of the Clayton Act open the federal courts to private citizens offering a uniquely federal remedy as an important part of the enforcement provisions of the antitrust laws. The private enforcement of these laws by injunctive relief is vested exclusively within the jurisdiction of the federal courts. This jurisdiction would be frustrated if federal courts did not have the power to enjoin a state court proceeding in an appropriate case. The present situation is a classic example. Here Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violations.

Several cases support our holding. In *Helfenbein* v. *International Industries, Inc.,* 438 F.2d 1068 (8th Cir. 1971), decided prior to *Mitchum,* the plaintiffs had filed suit seeking to recover treble damages for violation of the Sherman and Clayton Acts. The loss or damages claimed in the federal suit were due to one plaintiff being forced into arbitration and other plaintiffs being evicted from leased premises—consequences which under the issues presented to the federal court were alleged to have resulted from antitrust violations. The court, in upholding the trial judge's determination to deny an injunction, stated that there was no authority under the federal antitrust laws to enjoin state enforcement or remedy for collection of ordinary debts. The court found that the plaintiffs had "only remotely allude[d] to their potential loss or damage under federal law." *Id* at 1071. There had

been "no attempt in either the arbitration or eviction proceedings to enforce the very conduct . . . prohibited by the Clayton or Sherman Acts." *Id.* The court found that the loss or damage done to the plaintiffs was related to their defenses as provided under *state* law. The loss did not flow from any prohibition under *federal* laws—there was no evidence that the evictions resulted from their refusal to buy according to a "tie-in" agreement they had executed with the defendants. While the court did not expressly decide that injunctive relief would have been proper had the loss or damage been intricately connected to a federal antitrust claim, it is clear from the logic of the decision that this result would have been reached.

Another decision prior to *Mitchum* reached exactly this result. In *United States* v. *Bayer,* 135 F. Supp. 65 (S.D.N.Y. 1955), the court held that a contract between Bayer and I. G. Farber violated the Sherman Act. As part of the afforded relief, the court enjoined an assignee of Faber from enforcing in state court royalty payments under the contract. In holding that section 2283 did not bar the injunction, the court said:

> The answer [to section 2283] is that § 4 of the Sherman Act grants the United States District Court jurisdiction "to prevent and restrain violations" of the Act. The injunction is a necessary incident to the Court's power in order to effectuate its judgment that the Bayer contracts are illegal. Simply to declare the agreement illegal and at the same time permit recovery of the proceeds would render the decree of the court quite sterile. The purpose of the decree is not only to prevent repetition of past offenses but also "to prevent the defendants from acquiring any of the fruits of the condemned project." 135 F. Supp. at 73.

Studebaker Corp. v. *Gittlin,* 360 F.2d 692 (2d Cir. 1966), is also instructive. In an appeal by a stockholder from an order of the district court enjoining the use of other stock-

holder authorizations obtained without compliance with the proxy rules in a state court proceeding to obtain inspection of Studebaker's shareholders' lists, the Second Circuit held that section 2283 did not bar the injunction. The court distinguished the federal securities statutes which afford enforcement by private parties from the provisions of the National Labor Relations Act which restrict the enforcement of its provisions to the National Labor Relations Board. Judge Friendly, writing for the court, stated: "Section 16 of the Clayton Act . . . affords a closer parallel, since there as here the private suit plays an important part in enforcement." 360 F.2d at 698. He concluded that "where the very act of prosecuting the state proceeding violated federal law . . .," section 2283 did not stand in the way of enjoining the state court action. *Id.*[8]

When Congress enacted the various antitrust laws it created federal rights and remedies enforceable by private parties in a federal court of equity. That such powers were vested exclusively in the federal courts reflect the Congressional belief that the national objectives of the antitrust laws will be effectuated if entrusted to the jurisdiction of the federal courts. If federal courts are prohibited from enjoining state court proceedings which are part of an anticompetitive scheme in violation of the federal antitrust laws, the full scope and force of those laws will be seriously impaired. Moreover, the national interest in the preservation of competition—one of our most important public policies—would be frustrated. Accordingly, we hold that section 16 of the Clayton Act constitutes an "expressly authorized" exception to the anti-injunction provision of the Judicial Code.

Vendo further contends that even if the district court was not barred by section 2283 from issuing the injunction,

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[8] *Gittlin* was cited in *Mitchum* (407 U.S. at 237, n. 25) in discussing the meaning of the "expressly authorized" exception.

principals of comity and federalism constitute a bar. The principle of comity has no applicability when the exclusive remedy for an injury lies in the federal court. We are in agreement with the trial court's observation:

> Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention. *Lektro-Vend Corp.* v. *Vendo Company,* 403 F. Supp. 527, 537 (N.D. Ill. 1975).

It is also argued that the district court lacked jurisdiction to reverse, review, or revise the state court judgments in a collateral attack. While the district court conceded that it had no power to directly review cases from state courts, it went on to point out that here the plaintiffs' claim that "[T]he state court proceedings did not take account of Vendo's violations of antitrust law and were prosecuted in violation of Sections 1 and 2 of the Sherman Act. . . ." *Id.* at 529. Therefore, the "[S]tate court proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anti-competitive scheme." *Id.* at 532. The judge additionally commented: "The final Illinois Supreme Court opinion makes such a review imperative. The Illinois court expressly refused to consider the allegations that the state proceedings were part of an anti-competitive scheme. Plaintiffs, having never had a trial on this issue, must be heard in the only forum now available." *Id.* at 532, n. 4. We agree with these comments.

II

In determining that interlocutory relief was appropriate, the district court concluded that the plaintiffs had demonstrated a likelihood of ultimate success on the merits of their

claims. Defendant attacks this ruling by arguing that there was a total failure of proof. It says that the state court judgments are based on Stoner's violation of fiduciary duties and do not depend (contrary to the trial judge's findings) on the noncompetition covenants. Additionally, it is argued that the covenants are lawful when tested by antitrust standards.

In the first place, defendant's attack is overbroad. As we said in *Bath Industries* v. *Blot,* 427 F.2d 97, 111 (7th Cir. 1970), "[I]t is not necessary that the trial court find the certainty of a wrong, a likelihood is sufficient." Furthermore, since the grant of a temporary injunction rests within the sound discretion of the trial court, *Prendergast* v. *New York Telephone Co.,* 262 U.S. 43 (1923), appellate review is narrow. *Scherr* v. *Volpe,* 466 F.2d 1027 (7th Cir. 1972).

Secondly, when the Supreme Court of Illinois affirmed the judgments on the unadvanced theory that Stoner had violated his fiduciary duties, it did not consider or decide any of the antitrust issues presented here. It did not and could not evaluate Vendo's alleged monopolistic scheme which included the enforcements of the noncompetition covenants. The district court found that the covenants were "overly broad" and that there was substantial evidence that Vendo had the "required specific intent to monopolize" in a relevant market. Given the limitations of our review, we cannot say the trial court erred.

The judge states in his memorandum opinion:

> On the record as a whole, the Court finds that a preliminary injunction will prevent irreparable harm, protect the public interest, and will benefit plaintiffs more than it will burden Vendo. Continued efforts at collection will prevent Lektro-Vend Corporation from marketing a promising, newly-developed vending machine. The state court collection process places insurmountable barriers in the way of raising capital

> for any expansion program. Moreover, collection of the state judgment will effectively place Lektro-Vend in the hands of—or at least at the disposition of—Vendo. Stoner Investments is controlled by Mr. Stoner; 78.57% of Lektro-Vend is owned by Stoner Investments. Needless to say, Vendo would also control Stoner Investments. The case or controversy requirement contained in Article III then would require dismissal of Lektro-Vend and Stoner Investments. Continued collection thus would eliminate two of the plaintiffs herein. Moreover, Mr. Stoner's ability to effectively prosecute this action would be severely limited by further execution of the state court case. This also amounts to irreparable harm. (Citations omitted.)

We are not prepared to say that the court erred in reaching these conclusions.

Defendant's last contentions are that laches, waiver, and collateral estoppel bar injunctive relief. Issues not raised in the trial court cannot be presented for the first time on appeal. *United States* v. *Tyrrell,* 329 F.2d 341, 345 (7th Cir. 1964). As we noted in *Hamilton Die Cast, Inc.* v. *United States F. & G. Co.,* 508 F.2d 417, 420 (7th Cir. 1975): "[A] trial court should not be reversed on grounds that were never urged or argued below." Defendant failed to raise these issues in the trial court. Regardless of this procedural defect, we are convinced that these contentions are without merit.

The grant of interlocutory relief is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 28, 1976

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. ROBERT W. WARREN, District Judge*

LEKTRO-VEND CORP., etc., et al., Plaintiffs-Appellees, **No. 75-1792 & 75-1793 vs.** **THE VENDO COMPANY, etc., Defendants-Appellants.**	Appeal from the United States District Court for the Northern District of Illinois Eastern Division No. 65 C 1755 — The Honorable **Richard W. McLaren,** Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* Honorable Robert W. Warren, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 16, 1976

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. ROBERT W. WARREN, District Judge*

LEKTRO-VEND CORP., etc., et al., Plaintiffs-Appellees, **No. 75-1792, 75-1793 vs.** **THE VENDO COMPANY, etc., Defendant-Appellant.**	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. **No. 65 C 1755**

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be, and the same is hereby, DENIED.

Note: Judges Cummings, Pell and Tone did not participate in the disposition of this petition.

* The Honorable Robert W. Warren, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.